

**The Application of International Human Rights Law to
Maritime Security Operations**

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Abstract

This thesis argues that international human rights law (IHRL), as represented by a selection of universal and regional human rights treaties, provides an important normative framework within which maritime security operations (MSOs) are to be conducted. MSOs are mounted by States to deal with a spectrum of maritime security threats, and comprise a range of activities of a nature potentially to affect or engage individual rights. These activities include the use of force, deprivation of liberty, the rescue of those in distress at sea, and transfer or expulsion to other States. In addition, the aim of a MSO may amount to a potential infringement of individual freedoms, such as in the case of the policing of protest at sea.

Before examining the substantive rights that may be engaged through these activities, the thesis first considers the applicability of IHRL to MSOs conducted both within areas of the sea that are part of a State's territory, as well as those that are not. It concludes that, notwithstanding differences between the treaties concerned, and some remaining areas of controversy, a plausible argument can be made for the applicability of IHRL to most of the activities that comprise MSOs, wherever they are conducted.

An examination of substantive IHRL rules and norms then reveals that a range of rights are engaged in the course of MSOs. These include the right to life, the right to liberty and security of the person, the freedoms of expression and assembly, as well as the principle of *non-refoulement*. Although MSOs are subject to obligations under other bodies of law including, most notably, the law of the sea, IHRL provides a framework of regulation that is more comprehensive both in its breadth and in its detail. Although courts have sometimes recognised the unique features of the maritime domain when applying IHRL rules and norms to MSOs, it is demonstrated that their application can raise significant additional challenges in practice.

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List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
CAT	Convention Against Torture
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FSA	Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks
HRC	Human Rights Committee
IACHR	Inter-American Commission for
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IACtHR	Inter-American Court of Human Rights
ICJ	International Court of Justice
IHRL	International human rights law
ILC	International Law Commission
ITLOS	International Tribunal for the Law of the Sea
MIO	Maritime Interception/Interdiction Operations
MSO	Maritime Security Operations
NATO	North Atlantic Treaty Organisation
OAS	Organization of American States
SAR Convention	International Convention on Maritime Search and Rescue
SOLAS Convention	International Convention for the Safety of Life at Sea
SUA	Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties

1. Introduction

This thesis concerns the application of international human rights law (IHRL) to maritime security operations (MSOs). In order to frame the subsequent discussion, this introductory chapter begins with a section explaining several key concepts, beginning with a discussion of what is meant by the term 'maritime security', before turning to an examination of MSOs themselves. The chapter provides a short survey of relevant practice, before situating MSOs in international law by considering, briefly, where MSOs find their basis in, and how they are regulated by, bodies of international law other than IHRL. The chapter then proceeds to introduce IHRL, explaining its origins, before setting out its key sources and describing important principles concerning its content and application. The section on key concepts concludes by considering, in outline, how IHRL applies in the maritime domain. The second section then sets out the methodology adopted for the subsequent enquiry.

1.1. Key concepts

1.1.1. Maritime security

The term 'maritime security', at least in the sense in which it is currently used, is an expression of relatively recent origins. Before the end of the Cold War it was used, if at all, 'primarily in reference to sea control over maritime areas in the context of the superpower confrontation, that is to say in a naval context.'¹ Today, the term is used differently and, arguably, not entirely consistently. Indeed, it has been described as a 'buzzword' without 'definite meaning'.² This, however, is an exaggeration.

While a 'universally acceptable definition' may well prove elusive,³ there are consistent themes that run through the language used to describe and explain what is meant by maritime security. The *UK National Strategy for Maritime Security (UK National Strategy)* defines it as, 'The advancement and protection of the UK's national interests, at home and abroad, through the active

¹ Basil Germond, 'The Geopolitical Dimension of Maritime Security' (2015) 54 *Marine Policy* 137, 138.

² Christian Bueger, 'What is Maritime Security?' (2015) 53 *Marine Policy* 159, 163.

³ *ibid* 163.

management of risks and opportunities in and from the maritime domain, in order to strengthen and extend the UK's prosperity, security and resilience and to help shape a stable world.⁴ NATO refers to 'the maintenance of a secure and safe maritime environment'.⁵ Similarly, the United States' *National Strategy for Maritime Security (US National Strategy)* states that, 'The safety and economic security of the United States depends upon the secure use of the world's oceans.'⁶ It goes on to explain that

The oceans, much of which are global commons under no State's jurisdiction, offer all nations, even landlocked States, a network of sea-lanes or highways that is of enormous importance to their security and prosperity. ...

In today's economy, the oceans have increased importance, allowing all countries to participate in the global marketplace. More than 80 percent of the world's trade travels by water and forges a global maritime link. About half the world's trade by value, and 90 percent of the general cargo, are transported in containers. ...⁷

According to these definitions, maritime security is concerned with the maintenance of good order at sea, and the protection of States' and other

⁴ HM Government, *The UK National Strategy for Maritime Security* (May 2014) (*UK National Strategy*) 15. The *UK National Strategy* goes on to define five 'UK Maritime Security Objectives': '1. To promote a secure international maritime domain and uphold international maritime norms; 2. To develop the maritime governance capacity and capabilities of states in areas of strategic maritime importance; 3. To protect the UK and the Overseas Territories, their citizens and economies by supporting the safety and security of ports and on shore installations and Red Ensign Group (REG)-flagged passenger and cargo ships; 4. To assure the security of vital maritime trade and energy transportation routes within the UK Marine Zone, regionally and internationally. 5. To protect the resources and population of the UK and the Overseas Territories from illegal and dangerous activity, including serious organised crime and terrorism.' *ibid* 18 (citations omitted).

⁵ NATO, 'Alliance Maritime Strategy' (18 March 2011) <www.nato.int/cps/en/natohq/official_texts_75615.htm> accessed 10 May 2018 (Alliance Maritime Strategy) para 14.

⁶ US Government, 'The National Strategy for Maritime Security' (September 2005) (*US National Strategy*) 1.

⁷ *ibid* 1–2.

actors' interests from threats arising in, or from, the maritime domain,⁸ including threats to the lawful use of the oceans for trade.⁹

Maritime security is often explained with reference to particular specified threats or risks. Those identified in the *US National Strategy* are: nation-state threats, especially the use of the oceans to facilitate the deployment in the United States of a weapon of mass destruction (WMD);¹⁰ terrorist threats, including the use of the maritime environment to facilitate terrorist networks as well as to launch attacks directly on the United States;¹¹ transnational crime and piracy;¹² environmental destruction;¹³ and illegal seaborne immigration.¹⁴ The *UK National Strategy* envisages a changing set of risks, with those identified when the document was first published being:

- Terrorism affecting the UK and its maritime interests, including attacks against cargo or passenger ships;
- Disruption to vital maritime trade routes as a result of war, criminality, piracy or changes in international norms;
- Attack on UK maritime infrastructure or shipping, including cyber attack;
- The transportation of illegal items by sea, including weapons of mass destruction, controlled drugs and arms;
- People smuggling and human trafficking.¹⁵

Others often cited include illegal, unregulated and unreported fishing, as well as maritime accidents or disasters.¹⁶

Defining maritime security in this way has been criticised as incoherent, amounting to little more than a 'laundry list' of contemporary issues.¹⁷ Certainly,

⁸ See, for example, Germond, (n 1) 137, 138. See also UK Ministry of Defence, 'British Maritime Doctrine' (JDP 0-10, August 2011) (British Maritime Doctrine) 235.

⁹ See also British Maritime Doctrine (n 8) p238; Chris Trelawny, 'Maritime Security Beyond Military Operations' (2013) 158(1) *The RUSI J* 48, 48.

¹⁰ *US National Strategy* (n 6) 3–4.

¹¹ *ibid* 4–5.

¹² *ibid* 5.

¹³ *ibid* 6.

¹⁴ *ibid* 6.

¹⁵ *UK National Strategy* (n 4) 19.

¹⁶ See, for example, Germond (n 1) 138; Bueger (n 2) 159.

perceived threats to maritime security are inherently subjective, reflecting the particular interests and priorities of each State or actor. Such threats also change over time, at least with respect to their scale, and therefore the priority they are afforded. Nevertheless, it is difficult to detach the concept of maritime security from an understanding of those things that threaten it, at least if the term is to have any practical value. Consequently, while it may be that ‘no international consensus over the definition of maritime security has emerged’,¹⁸ it is hard to conceive of a preferable alternative approach.

1.1.2. Maritime security operations

Maritime security is to be achieved in various ways. The *UK National Strategy* divides these into three broadly-defined ‘tasks’: to ‘exert [the UK’s] levers of influence to uphold and strengthen the rules-based international system which governs the maritime domain, and which underpins our national security and prosperity’; ‘to strengthen our protection against known threats, improving security and reducing vulnerabilities’; and ‘[w]here we have identified activities which may be illegal, or which may threaten our national interests...to respond in a timely, precise and intelligent manner.’¹⁹ The latter two tasks, to ‘protect’ and to ‘respond’, both involve the deployment of naval or law-enforcement assets. As the *UK National Strategy* explains, ‘The “protect” task includes...the deployment of Royal Navy units to enforce international maritime law and protect UK merchant shipping’.²⁰ The ‘respond’ task includes the use of ‘law enforcement assets to police the UK’s borders, to prevent the trafficking of illegal goods and to protect our economic resources, as well as a range of military capabilities that can, as a last resort, use lethal force to protect our people, economy, infrastructure, territory and way of life from seaborne threats.’²¹ Such use of maritime assets to contribute to maritime security by upholding the rule of law at sea defines what is usually meant by the term ‘maritime security operations’.²²

¹⁷ Bueger (n 2) 159–160.

¹⁸ Bueger (n 2) 160 (citations omitted).

¹⁹ *UK National Strategy* (n 4) 23.

²⁰ *ibid.*

²¹ *ibid.*

²² See, for example, Royal Netherlands Navy, ‘Fundamentals of Maritime Operations: Netherlands Maritime Military Doctrine’ (2014) (Netherlands

Just as the concept of maritime security is often defined with reference to specific threats, MSOs are generally discussed with reference to examples of operations mounted to counter those threats. According to UK naval doctrine, MSOs 'span a wide range of operations from defence (short of war-fighting) through to security to development and relieving human suffering by utilising the full spectrum of maritime forces and their attributes.'²³ These operations include those conducted against threats such as 'piracy, slavery, people smuggling, illegal immigration, drug smuggling, arms smuggling, terrorism and the proliferation of weapons of mass destruction; as well the protection of the maritime environment, including fisheries.'²⁴ US doctrine similarly cites, as examples of MSOs, 'missions to counter maritime-related terrorism, weapons proliferation, transnational crime, piracy, environmental destruction, and illegal seaborne immigration.'²⁵ MSOs also include 'assisting mariners in distress, participating in security cooperation operations with allies and partners, sharing situational awareness, and conducting maritime interception and law enforcement operations'.²⁶

While encompassing a broad range of operations, MSOs often involve the interception, by a State's ships, of vessels suspected to be engaging in activity that is somehow threatening maritime security.²⁷ These activities are referred to as 'maritime interception operations' (MIO),²⁸ or, alternatively, as 'maritime interdiction operations',²⁹ and involve 'efforts to monitor, query, and board

Maritime Military Doctrine) para 12.1 ('[MSO] are designed to protect interests in the maritime domain against breaches of the (international) rule of law. MSO consist of all activities targeting civil actors who violate agreements regarding the use of the sea, such as international treaties and UN Security Council resolutions. The purpose of MSO is law enforcement; national maritime forces function here as a national or international police force.')

²³ British Maritime Doctrine (n 8) 234.

²⁴ *ibid.*

²⁵ US Joint Chiefs of Staff, 'Command and Control for Joint Maritime Operations' (JP 3-32, 7 August 2013) (JP 3-32) I-4.

²⁶ *ibid* I-4.

²⁷ See, for example, Netherlands Maritime Military Doctrine (n 22) para 12.1.

²⁸ This is the term used by the US. JP 3-32 (n 25) IV-20.

²⁹ See, for example, Netherlands Maritime Military Doctrine (n 22) para 12.4. NATO refers instead to 'maritime interdiction missions'. Alliance Maritime Strategy (n 5) para 15.

merchant vessels'.³⁰ While they may be employed in order to counter a broad, arguably unbounded, set of maritime security threats, MIO have clearly-defined characteristics with respect to their execution. Dutch doctrine, for example, identifies four activities that constitute MIO: 'intelligence and picture compilation', in which a range of means are employed to understand the patterns of shipping in a particular area, and to identify vessels suspected of violating the law; 'query', in which vessels are engaged by radio or other means of communication in order to gather information about their activities and intentions; 'boarding', in which individuals deployed from a naval or coastguard vessel embark in a suspect vessel to conduct an inspection of its documentation and/or search of its cargo, crew, or passengers; and 'diversion', in which a suspect vessel is compelled to alter its planned route, sometimes to a specific port in order to facilitate further inspection.³¹

The practice of boarding is worthy of particular attention. As will be shown, it is in the context of boarding, and the actions ancillary to it, that some of the most prominent human rights issues are engaged. While much of the material describing how boarding is conducted at the tactical level is either classified or withheld for official use only, Dutch doctrine contains a helpful, publicly available, account.³² Given Netherlands' membership of NATO, its practice can be considered broadly representative, at least among NATO nations. What follows, therefore, is a broad overview, intended to provide an outline upon which subsequent chapters will build in describing the practice relevant to each individual topic under discussion.

Boarding operations are divided into three types depending on the level of resistance the vessel to be boarded is displaying or is expected to display. An 'unopposed boarding' is one in which the vessel is cooperative, and no resistance is therefore expected. A 'non-cooperative boarding' is one in which the vessel does not cooperate with the boarding, but no active resistance is anticipated. Finally, an 'opposed boarding' is one in which active resistance is

³⁰ JP 3-32 (n 25) IV-20. MIO are sometimes considered to encompass wartime activities, such as the enforcement of blockades, which are outside the normal definition of MSO. See, for example, Netherlands Maritime Military Doctrine (n 22) 341.

³¹ Netherlands Maritime Military Doctrine (n 22) 342–43.

³² *ibid* 349–54.

expected, including the use of weapons or other measures posing a physical danger to personnel conducting the boarding.³³ This categorisation will dictate the size and nature of forces employed. Under Dutch doctrine, for example, an opposed boarding can only be conducted by, or with the assistance of, special operations forces.³⁴ The type of boarding will also determine the level of force, if any, likely to be required to conduct the boarding.

In conducting the boarding, the first step is to prepare the target vessel, so far as is possible, to receive the boarding party. This involves directing the vessel to stop or to adopt a particular course and speed to facilitate boarding. If the vessel is not cooperative, force may be required to persuade it to comply. Such use of force will follow an established, escalatory, sequence until compliance is achieved. First, warning shots will be fired, often across the vessel's bow, but, in any case, carefully aimed so as not to hit it. Next, 'non-disabling fire' will be directed against parts of the vessel that do not affect its ability to float and manoeuvre, such as areas of the superstructure above the waterline. Finally, 'disabling fire' will be aimed at parts of the ship essential to its operation, such as its engine or steering gear.³⁵ Once the vessel is prepared, a security team will be inserted by helicopter or boat to ensure that it is safe for the remainder the boarding party to embark. At that point, the boarding party will conduct whatever activity is required to fulfil the objective of the operation, usually involving an inspection of the vessel, together with its documentation, its cargo and its crew.³⁶ Depending on the outcome of that inspection, subsequent action may include the seizure of the vessel or its cargo, and/or the arrest and detention of members of its crew. Seized goods may be subject to adjudication or, in some cases, destroyed. Detained individuals may be prosecuted, either by the interdicting State, or by another into whose custody they have been transferred.³⁷

³³ *ibid* 349–50.

³⁴ *ibid* 350. Special operations forces are specialised teams trained and equipped to perform a variety of particular tasks, including providing the 'specialist striking power in MSO'. *ibid* 279.

³⁵ *ibid* 351–52. In the case of an opposed boarding, these steps may be omitted in favour of a surprise, 'takedown operation', achieved through insertion of specialised forces by other means. *ibid* 352.

³⁶ *ibid* 352.

³⁷ *ibid* 353.

Summarising this, a generic interdiction can be broken into a number of steps, for example:

1. The interdicting State becomes aware of a vessel that it wishes to investigate.
2. A ship sent to interdict the vessel makes contact with the vessel (e.g. by radio), instructing it to stop and submit to investigation.
3. If the vessel does not comply, the interdicting ship may use a series of escalating measures, including the use of warning shots, non-disabling fire and disabling fire, to compel the vessel to follow its instructions.
4. The interdicting ship may send a boarding party to the vessel, which may or may not cooperate with the boarding. The boarding party conducts an investigation, potentially including searches of the vessel and its crew, and potentially including the use of force to compel compliance with its directions.
5. The interdicting ship takes control of the interdicted vessel and its crew.
6. The boarding party may detain individuals and hold them on the vessel.
7. Individuals from the vessel, including detainees and others such as, for example, irregular migrants or freed slaves, may be transferred to the interdicting ship.
8. The vessel may be towed or escorted to another location, such as a port of the interdicting State.

Although MSOs include a wider range of activities than just interdictions, and interdictions do not necessarily follow a rigid script, this sequence will be referred to in the analysis at various points throughout the thesis. It is particularly pertinent to the issue of extraterritorial applicability, which, as will be shown, often depends on the level of control being exercised over individuals at a particular point in time.

1.1.3. Maritime security operations in international law

Although the focus of this thesis is the application of IHRL to MSOs, a significant thread relates to the interaction between IHRL and other relevant

bodies of international law. In any case, an understanding of other international law rules and norms is important context in which to understand the operation of IHRL. There are two broad aspects to this: first, the role of other bodies of international law in providing the legal basis for MSOs;³⁸ and, second, their role, to some extent, in regulating how MSOs are to be conducted.

1.1.3.1. Bases for MSOs in international law

With 168 parties,³⁹ as well as being widely considered to be, in large part, reflective of customary international law,⁴⁰ the United Nations Convention on the Law of the Sea (UNCLOS)⁴¹ has been described as the “constitution” for the world’s oceans.⁴² As such, it provides the underlying legal framework within which States’ activities in the maritime domain, including MSOs, are conducted. Central to this framework are the rules that determine the circumstances in which States may exercise jurisdiction over vessels.⁴³ These provisions often provide the legal basis, in whole or in part, for MSOs.

Jurisdiction over vessels under the UNCLOS regime is considered throughout this thesis, particularly in Chapters Two and Three. In broad terms, however,

³⁸ See, generally, Rob McLaughlin, ‘Authorizations for Maritime Law Enforcement Operations’ (2017) 98(2) *Intl Rev of the Red Cross* 465.

³⁹ As of 27 June 2018. ‘Status of Treaties’ (*United Nations Treaty Collection*) <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 27 June 2018.

⁴⁰ See, for example, R R Churchill and A V Lowe, *The Law of the Sea* (Manchester UP 1999) 17–18 (‘Indeed, at least the broad principles of many of the innovations made by the 1982 Convention, such as the establishment of rights to 200-mile Exclusive Economic Zones (EEZs), had passed into customary law some years before the Convention itself entered into force.’); James Kraska, ‘Broken Taillight at Sea: the Peacetime International Law of Visit, Board, Search and Seizure’ (2010) 16(1) *Ocean & Coastal L J* 1, 10. Notably, given its status as a non-party to UNCLOS, the long-standing position of the United States is that, with the exception of Part XI, which deals with the international seabed area, UNCLOS reflects customary law. President Ronald Reagan, ‘Statement on United States Ocean Policy’ (10 March 1983) 19 *Weekly Compilation of Presidential Documents* 383. Statement of the President.

⁴¹ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS).

⁴² Kraska (n 40) 10. Importantly, particularly noting the scope for disagreement as to the customary status of UNCLOS, it replicates a number of provisions found in earlier instruments, including the High Seas Convention and Territorial Sea Convention, to which non-UNCLOS States may be party.

⁴³ On jurisdiction over vessels, generally, see Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (CUP 2009) 7–10.

the applicable rules depend, to a great extent, on the physical location of the vessel over which jurisdiction is to be asserted. The oceans are divided into a number of zones defined by distance from a coastal State.⁴⁴ Within each, the coastal State is entitled to exercise jurisdiction over vessels in certain prescribed situations;⁴⁵ those rights differ from zone to zone, generally diminishing with distance from the coastal State's shores. Otherwise, absent any rights as a coastal State, the general rule is that exclusive jurisdiction is enjoyed by a vessel's flag State.⁴⁶ Except where permitted by another rule of international law, interference with a foreign-flagged ship amounts to a violation of the prohibition on the use of force, as set out in Article 2(4) of the UN Charter.⁴⁷

In international waters, the exclusive jurisdiction of the flag State is subject to several important exceptions, notably where a right of visit with respect to a vessel that is suspected of engaging in piracy, unauthorised broadcasting or slavery.⁴⁸ In addition, any State may exercise its jurisdiction on board a vessel that is stateless, or that can be assimilated as such because it flies, for convenience, more than one flag.⁴⁹ Furthermore, a vessel's flag State may grant another State permission to exercise jurisdiction over it, either under a standing arrangement,⁵⁰ or on a case-by-case basis.⁵¹

The jurisdictional regime set out in UNCLOS is subject to 'other rules of international law'.⁵² Pre-eminent amongst these are the rules contained in the

⁴⁴ See below ss 2.1, 3.3.3.

⁴⁵ McLaughlin (n 38) 478–79.

⁴⁶ UNCLOS (n 41) art 92(1) ('Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.')

⁴⁷ Guilfoyle, *Shipping Interdiction and the Law of the Sea* (n 43) 272–77. Guilfoyle argues convincingly that this conclusion precludes interdiction 'even as a countermeasure following another state's unlawful conduct at sea.' *ibid* 277.

⁴⁸ UNCLOS (n 41) art 110(1)(a)–(c). See also McLaughlin (n 38) 483–87.

⁴⁹ UNCLOS (n 41) arts 92(2), 110(1)(d)–(e).

⁵⁰ McLaughlin (n 38) 476–77

⁵¹ *ibid* 473–76.

⁵² UNCLOS (n 41) arts 2(1), 21(1), 34(2), 58(3), 87(1), 138, 293(1).

Charter of the United Nations,⁵³ obligations arising from which take precedence over those contained in any other international agreement to which a State may be party.⁵⁴ In particular, where the UN Security Council determines that there exists a 'threat to the peace, breach of the peace, or act of aggression', it may take action 'to maintain international peace and security.'⁵⁵ Such measures may or may not involve the use of armed force, and examples of each are set out in the Charter. Non-forceful measures include 'may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.'⁵⁶ Forceful measures 'may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.'⁵⁷ These powers have been used in practice, for example, to permit States to take action to suppress armed robbery in Somalia's territorial sea,⁵⁸ as well as to create powers to enforce various arms embargoes.⁵⁹

Another important rule of international law to which the UNCLOS regime may be subject is the right of States to use force in self-defence, a customary international law right recognised in Article 51 of the UN Charter. According to the right of self-defence, a State is permitted to use necessary and proportionate force, including otherwise prohibited forceful measures against foreign-flagged ships.⁶⁰ It arises, however, only where a State is subject to an armed attack, although the exact contours of this requirement are the subject of substantial and ongoing debate, not least with respect to whether there is a

⁵³ Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter).

⁵⁴ *ibid* art 103.

⁵⁵ *ibid* art 39.

⁵⁶ *ibid* art 41.

⁵⁷ *ibid* art 42.

⁵⁸ See, for example, UNSC Res 1846 (2 December 2008) UN Doc S/RES/1846 para 10. This is one of a lengthy series of such authorisations. Robin Geiß and Anna Petrig, *Piracy and Armed Robbery at Sea* (OUP 2011) 70–84.

⁵⁹ See, for example, UNSC Res 2182 (24 October 2014) UN Doc S/RES/2182 paras 11–22. This UNSCR authorises actions in connection with the arms embargo (and charcoal ban) on Somalia. See also McLaughlin (n 38) 480–83.

⁶⁰ Efthymios Papastavridis, *Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Hart 2013) 149–54; McLaughlin (n 38) 477–78.

right to use force in anticipation of an imminent armed attack.⁶¹ Without addressing it in detail, the debate concerns the question whether, and in what circumstances, the right to use force in self-defence arises before an armed attack actually manifests itself. This is important in the present context because of the likelihood that MSOs conducted on the basis of self-defence will most plausibly be justified on account of the suspected future use of a vessel or its cargo, or the suspected future actions of individuals being carried on board.⁶² For present purposes, it is sufficient to note that where self-defence is relied upon as the basis for MSOs, the legitimacy of that basis may be subject to particular controversy.

1.1.3.2. The regulation of MSOs in the law of the sea and other bodies of international law

Aside from providing a legal basis for MSOs, bodies of international law other than IHRL also contain rules that regulate the conduct of MSOs, in that they contain obligations applicable during their execution. An important potential example is the law of armed conflict. However, as noted explicitly in UK doctrine,⁶³ and as can be gathered from the typical tasks listed above, MSOs are generally considered to comprise peacetime activities. While there is no reason in theory why MSOs could not be conducted during, or even give rise to the existence of, an armed conflict, the present enquiry will assume a peacetime context. Suffice it to note, however, that the application of the law of armed conflict would engage particularly complex, and still unresolved, questions concerning the interaction between that body of law and IHRL.⁶⁴

Several other bodies of international law may contain rules applicable to particular aspects of MSOs. For example, refugee law contains *non-refoulement* provisions that may, in some circumstances, apply to States in their treatment of individuals during the course of MSOs.⁶⁵ Most relevant to this thesis, however,

⁶¹ See, for example, Yoram Dinstein, *War, Aggression and Self-Defence* (6th edn, CUP 2017) 222–35; 170–75, Christine Gray, *International Law and the Use of Force* (4th edn, OUP 2018) 248–56.

⁶² See, for example, Papastavridis (n 60) 150.

⁶³ British Maritime Doctrine (n 8) 234.

⁶⁴ See, for example, Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 229–61.

⁶⁵ See below s 7.2.2.

is the regulation of MSOs in the law of the sea, which contains rules, found in either treaty or custom, that provide a degree of regulation for certain activities undertaken in the course of MSOs. For example, Article 110 UNCLOS contains a right, in certain prescribed circumstances, for warships and other authorized government vessels to visit a ship in order to verify its right to fly its flag.⁶⁶ Further to this right, Article 110(2) goes on to specify the procedure that must be followed, namely to 'send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.' Nevertheless, UNCLOS contains significant gaps with respect to the regulation of MSOs. It is, for example, silent on the degree of force, if any, that may be used to enforce the right of visit contained in Article 110.⁶⁷ The thesis returns to the question of authorisation and regulation under UNCLOS as a pervasive issue throughout.

1.1.4. International human rights law

IHRL is obviously central to this thesis. As will be explained, the focus of the analysis is on the application of a number of specific treaties to MSOs: the International Covenant for Civil and Political Rights (ICCPR);⁶⁸ the European Convention on Human Rights (ECHR);⁶⁹ the American Convention on Human Rights (ACHR);⁷⁰ the African Charter on Human and Peoples' Rights (ACHPR);⁷¹ and the Convention Against Torture (CAT).⁷² This section puts these instruments in to historical and legal context, as well as introducing the institutions principally responsible for supervising their application. It also discusses IHRL more widely, including law found outside treaties, in order both

⁶⁶ UNCLOS (n 41) art 110(2).

⁶⁷ See below ch 4.

⁶⁸ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁶⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

⁷⁰ American Convention on Human Rights: 'Pact of San José, Costa Rica' (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 144 (ACHR).

⁷¹ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (ACHPR).

⁷² Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 113 (CAT).

to situate the treaties on which the thesis concentrates, as well as to help explain the rationale for that focus.

1.1.4.1. Historical context

Although the body of IHRL, as we recognise it today, and with which this thesis is primarily concerned, emerged during the period following the Second World War,⁷³ its origins are much older. Certain rights of individuals had, for several centuries, been recognised and protected in domestic law.⁷⁴ On the international plane, while a State's treatment of its own citizens had generally been considered a matter for that State alone,⁷⁵ various treaty provisions did address discrete issues that we would now recognise as relating to human rights.⁷⁶ Then, during the inter-war period, momentum began to grow towards bringing about the recognition of a comprehensive catalogue of fundamental rights.⁷⁷ Initiatives included the *Institut de Droit International's* 'Declaration of the International Rights of Man',⁷⁸ which set out rights to life, liberty and property, as well as freedoms of religion and language, all of which were to be afforded without distinction as to nationality, sex, race, language or religion.

During the Second World War, the Allied Powers presented the lines of conflict as being drawn between different value systems.⁷⁹ In January 1941, US President Franklin D Roosevelt proposed in a speech to Congress 'four freedoms' that were to be secured everywhere in the world: the 'freedom of speech and expression'; the 'freedom of every person to worship God in his own way'; the 'freedom from want'; and the 'freedom from fear'.⁸⁰ Later the same year, Roosevelt and UK Prime Minister Winston Churchill adopted the 'Atlantic Charter', affirming, amongst other provisions, what today would be

⁷³ Ed Bates, 'History' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, OUP 2014) 28–31; Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (OUP 2009) 13–14.

⁷⁴ Bates (n 73) 16–23; Kälin and Künzli (n 73) 4–6.

⁷⁵ Bates (n 73) 23–28.

⁷⁶ William A Schabas, *The Universal Declaration of Human Rights: The Travaux Préparatoires*, vol 1 (CUP 2013) lxxii.

⁷⁷ *ibid* lxxiii.

⁷⁸ Reproduced in George A Finch, 'The International Rights of Man' (1941) 35 *AJIL* 662, 663–4.

⁷⁹ Schabas (n 76) lxxiii–lxxv.

⁸⁰ Reproduced in United States Congressional Record (1941) vol 87, pt 1.

recognised as a right of self-determination.⁸¹ Subsequently, in 1942, thirty-six States, including the United States, the United Kingdom, Russia and China, signed the 'Declaration of the United Nations', setting out a commitment to 'preserve human rights' and provide a 'decent life, liberty, independence, and religious freedom'.⁸²

In due course, the notion that human rights should be protected internationally was reflected in the drafting of the UN Charter. While there was resistance to the inclusion of the sort of language used in the Declaration of the International Rights of Man and in the Atlantic Charter,⁸³ reference was made to human rights throughout the UN Charter, most notably in Article 1(3), which states the purposes of the UN as including 'promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion...'. Admittedly, none of the references to human rights in the UN Charter ask much, in concrete terms, of either member States or the UN itself.⁸⁴ Furthermore, any practical effect was tempered through the inclusion, in Article 2(7), of a clause generally reserving 'matters which are essentially within the domestic jurisdiction of any state' to the State concerned.⁸⁵ Nevertheless, the references to human rights in the UN Charter at least placed them on the international agenda.

One specific requirement of the UN Charter was the creation, under Article 68, of a commission 'for the promotion of human rights'. The body that was created, the Commission on Human Rights, was tasked with the preparation of an 'international bill of rights', which it ultimately achieved in two distinct stages. First, it prepared the Universal Declaration of Human Rights (UDHR),⁸⁶ which was adopted by UN General Assembly resolution on 10 December 1948. Second, it drafted two corresponding treaties, the ICCPR and the International

⁸¹ 'The Atlantic Charter' (1946–47) UNYB 2.

⁸² 'The Declaration by United Nations' (1946–47) UNYB 1.

⁸³ Schabas (n 76) lxxv–lxxvi.

⁸⁴ Bates (n 73) 30.

⁸⁵ Schabas (n 76) lxxvii.

⁸⁶ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

Covenant on Economic, Social and Cultural Rights (ICESCR),⁸⁷ which entered into force on 23 March and 3 January 1976 respectively.

The UDHR was drafted during an intense period of activity between the Commission's first session in early 1947 and the adoption of the final document by the General Assembly in 1948.⁸⁸ Its status as something less than a treaty permitted both its rapid adoption and the broad sweep of its provisions. Spanning both civil and political rights (e.g. the right to life⁸⁹ and the freedoms of expression⁹⁰ and assembly⁹¹) and economic, social and cultural rights (e.g. the rights to work⁹² and education⁹³), the UDHR set the agenda for the subsequent Covenants and for the post-war international human rights project more generally.

1.1.4.2. The universal system

At the international level, a number of treaties protect either particular rights or the rights of particular categories of people.⁹⁴ Generally, each instrument makes provision for a body that has responsibility for monitoring and enforcing compliance with the relevant substantive provisions. None of these bodies is judicial in the strict sense, the mechanisms for enforcement instead being weaker in character, most commonly centred on the submission and consideration of reports submitted periodically by States Parties. Some instruments make provision for individuals to petition the relevant treaty body directly, although acceptance of such mechanisms is usually optional for States.⁹⁵

The full range of rights and categories of people protected at the international level is very broad. Consequently, only a selection of instruments is of potential

⁸⁷ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

⁸⁸ Schabas (n 76) lxxxiii–cxi.

⁸⁹ UDHR (n 86) art 3.

⁹⁰ *ibid* art 19.

⁹¹ *ibid* art 20.

⁹² *ibid* art 23.

⁹³ *ibid* art 26.

⁹⁴ See, generally, Jane Connors and Markus Schmidt, 'United Nations' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, OUP 2014).

⁹⁵ Kälin and Künzli (n 73) 206–8.

significance in the conduct of MSOs. Of particular importance is the ICCPR, which, alongside the ICESCR, protects, in treaty form, the rights set out in the UDHR. However, it is the ICCPR that contains rights likely to be engaged directly in the course of MSOs. Such rights include the right to life;⁹⁶ the prohibition of torture and cruel, inhuman or degrading treatment or punishment;⁹⁷ the right to liberty and security of the person, including the prohibition of arbitrary arrest or detention;⁹⁸ the right to a fair trial;⁹⁹ and the freedoms of expression and assembly.¹⁰⁰

In contrast to the UDHR, the rights contained in the ICCPR are framed in considerable detail as to their scope, reflecting the latter instrument's treaty status. Notably, it sets out the circumstances in which rights may be limited, as well as limiting the applicability of the instrument, as a whole. Under Article 2(1), States 'undertake to respect and to ensure to all individuals within [their] territory and subject to [their] jurisdiction the rights recognized in the present Covenant...'. As the discussion in Chapter Three explains, the meaning of this phrase in the context of the extraterritorial applicability of the ICCPR has been especially controversial.¹⁰¹

Monitoring compliance with the ICCPR is primarily the responsibility of the Human Rights Committee HRC,¹⁰² composed of eighteen members nominated and elected by States Parties.¹⁰³ The HRC participates in three distinct procedures. First, it considers and makes 'general comments' upon periodic reports submitted by States Parties 'on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights...'.¹⁰⁴ Second, it participates in an optional inter-State communication procedure.¹⁰⁵ Under this, the Committee provides its good

⁹⁶ ICCPR (n 68) art 6.

⁹⁷ *ibid* art 7.

⁹⁸ *ibid* art 9.

⁹⁹ *ibid* art 14.

¹⁰⁰ *ibid* arts 19, 21.

¹⁰¹ See below s 3.2.1.2.

¹⁰² On the HRC, and treaty bodies generally, see Nigel S Rodley, 'The Role and Impact of Treaty Bodies' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013).

¹⁰³ ICCPR (n 68) arts 28–39.

¹⁰⁴ *ibid* art 40.

¹⁰⁵ *ibid* art 41.

offices in order to address allegations by one State Party of the failure by another to fulfil its obligations under the Covenant. The Committee is not empowered to reach any conclusion as to the merits of the communication, its role being limited essentially to facilitating conciliation between the States Parties. Finally, under the First Optional Protocol to the ICCPR,¹⁰⁶ the Committee is empowered to consider complaints submitted by individuals subject to the jurisdiction of a State Party to the Optional Protocol, 'who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.'¹⁰⁷ It may, subject to various admissibility criteria,¹⁰⁸ examine such complaints to reach 'views' upon them.¹⁰⁹ While these views are not binding in a strict legal sense, the Committee itself considers them authoritative interpretations of the Covenant and, as such, subject to the general principle that treaty obligations be honoured in good faith.¹¹⁰

As well as being contained in the ICCPR, the prohibition of torture and other cruel, inhuman or degrading treatment or punishment is also the subject of a separate convention, the CAT. The provisions contained in the CAT are far more detailed than those in the ICCPR and are, in some ways, broader in their scope of application. Under the CAT, State parties are required to 'take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under [their] jurisdiction.'¹¹¹ Each is required to criminalise acts of torture 'committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State'¹¹² as well as '[w]hen the alleged offender is a national of that State'.¹¹³ Importantly, the latter requirement is engaged wherever the alleged act of torture takes place. In addition, a State Party may criminalise torture on the basis of then passive personality principle, i.e., '[w]hen

¹⁰⁶ Optional Protocol to the International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR Optional Protocol).

¹⁰⁷ *ibid* art 1.

¹⁰⁸ *ibid* arts 3, 5(2).

¹⁰⁹ *ibid* art 5(4).

¹¹⁰ UN Human Rights Committee, 'General Comment 33' (5 November 2008) UN Doc CCPR/C/GC/33 para 15.

¹¹¹ CAT (n 72) art 2(1).

¹¹² *ibid* art 5(1)(a).

¹¹³ *ibid* art 5(1)(b).

the victim is a national of that State...'.¹¹⁴ State Parties are also required to either extradite or establish jurisdiction over *any* person alleged to have committed an act of torture who is present in any territory under its jurisdiction.¹¹⁵

The protection under the CAT for acts of cruel, inhuman or degrading treatment or punishment not amounting to torture is lesser (or at least less specific) than that for acts of torture.¹¹⁶ States parties are required to prevent such acts in any territory under their jurisdiction and must, for example, conduct investigations into credible allegations. However, under the CAT there is no express requirement to either prosecute or extradite individuals alleged to be responsible for acts not amounting to torture.

The implementation of the CAT is the responsibility of the Committee against Torture. As in the case of the Human Rights Committee, the Committee against Torture considers periodic reports submitted by States Parties¹¹⁷ and participates in both an optional inter-State communication procedure¹¹⁸ and an optional individual complaint procedure.¹¹⁹ In addition, the Committee against Torture is empowered to conduct an 'inquiry' in the event that it 'receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party...'.¹²⁰ Such proceedings are confidential, with the findings being transmitted only to the State Party concerned, whose cooperation is to be sought throughout but is not required. Following consultation with the State Party, the Committee may choose to include a 'summary account' of the proceedings in its annual report.

1.1.4.3. Regional systems

Regional systems, in contrast to the universal system, tend to have more robust systems of enforcement. The various systems are not uniform in this regard, although obvious trends and similarities can be identified. Most began with an

¹¹⁴ *ibid* art 5(1)(c).

¹¹⁵ *ibid* art 5(2).

¹¹⁶ *ibid* art 16.

¹¹⁷ *ibid* art 19.

¹¹⁸ *ibid* art 21.

¹¹⁹ *ibid* art 22.

¹²⁰ *ibid* art 20.

instrument supervised by a 'commission', empowered to consider complaints submitted either by States Parties or individuals. Some such commissions were, or have since been, supplemented, or superseded, by courts. While the findings of commissions have been, and remain, highly influential in the development of the law, it is the binding judgments of the regional courts that represent the high-water mark in the enforcement of international human rights law. While commissions may generally make and communicate their findings on a particular matter, their conclusions ultimately have no binding force. The courts, on the other hand, may give binding judgments, either in cases where States have failed to act on the findings of the relevant commission, or where a case has been submitted to a court directly.

The ECHR, which entered into force in 1953 under the auspices of the Council of Europe, is the earliest of the treaties purporting to set out a catalogue of human rights.¹²¹ Chiefly focused on civil and political rights, it has been extended into the realm of economic, social and cultural rights through subsequent Protocols. In terms of its importance in relation to the conduct of MSOs, it includes rights that correspond to each of those identified in the ICCPR as being most relevant, namely the right to life;¹²² the prohibition of torture and inhuman or degrading treatment or punishment;¹²³ the right to liberty and security;¹²⁴ the right to a fair trial;¹²⁵ and the freedoms of expression and assembly.¹²⁶ However, the ECHR rights are expressed in different terms than in the equivalent ICCPR provisions and, as a result, some substantive differences exist in their scope and content.

Like the ICCPR, the ECHR is limited in the scope of its application, albeit in slightly different terms. Under Article 1, States Parties 'shall secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention.' As discussed in Chapter Three, the meaning of this provision, particularly in

¹²¹ On the evolution of the European system, see Dinah L Shelton and Paolo G Carozza, *Regional Protection of Human Rights* (2nd edn, OUP 2013) 154–57. On the European system, generally, see Steven Greer, 'Europe' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, OUP 2014).

¹²² ECHR (n 69) art 2.

¹²³ *ibid* art 3.

¹²⁴ *ibid* art 5.

¹²⁵ *ibid* art 6.

¹²⁶ *ibid* arts 10, 11.

relation to the extraterritorial application of the ECHR has been and remains deeply controversial.

The original text of the ECHR provided for the creation of both a European Commission of Human Rights¹²⁷ and a European Court of Human Rights.¹²⁸ The Commission was empowered to receive allegations of breaches of the Convention by any State Party¹²⁹ or, optionally, from individuals, organisations or groups claiming to be victims of the breach.¹³⁰ Allegations were subject to examination and, potentially, investigation, with an initial aim of reaching a friendly settlement.¹³¹ In contrast to the equivalent procedure of, e.g., the HRC, if a friendly settlement was not reached, then the Commission was required in its report to 'state its opinion as to whether the facts found disclose a breach...'.¹³²

The jurisdiction of the Court was initially optional¹³³ and confined to matters referred to it by States Parties or the Commission.¹³⁴ It had authority to deal with 'all cases concerning the interpretation and application of the present Convention...' ¹³⁵ and to reach final, ¹³⁶ binding judgments.¹³⁷

The Commission/Court system was replaced in 1998 by a single Court.¹³⁸ Under the current system alleged breaches may be referred directly to the Court by States Parties¹³⁹ and, significantly, by individual, organisations and groups

¹²⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, as adopted (adopted 5 November 1950, entered into force 3 September 1953) ETS 5 (ECHR as adopted) art 19(1).

¹²⁸ *ibid* art 19(2).

¹²⁹ *ibid* art 24.

¹³⁰ *ibid* art 25.

¹³¹ *ibid* art 28.

¹³² *ibid* art 31(1).

¹³³ *ibid* art 46.

¹³⁴ *ibid* art 44.

¹³⁵ *ibid* art 45.

¹³⁶ *ibid* art 52.

¹³⁷ *ibid* art 53.

¹³⁸ Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 11 May 1994, entered into force 1 November 1998) ETS 155.

¹³⁹ ECHR (n 69) art 33.

claiming to be victims.¹⁴⁰ The Court's judgments are, as before, both final¹⁴¹ and binding.¹⁴²

The American system for the protection of human rights dates back to 1948 and the creation of the Organization of American States (OAS).¹⁴³ Alongside the Charter of the Organization of American States¹⁴⁴ the American Declaration of the Rights and Duties of Man was also adopted.¹⁴⁵ This predated the UDHR by just a few months and covers similar ground, encompassing both civil and political rights as well as economic, social and cultural rights. While not intended to be legally binding, the Declaration has subsequently been held by the institutions of the American human rights system to be a source of legal obligations for OAS member states, notwithstanding the controversy of this position.¹⁴⁶

A smaller grouping of states,¹⁴⁷ not including the United States, are also party to the later ACHR. The ACHR, which entered into force in 1978, consists almost entirely of civil and political rights. As for the ECHR, the ACHR includes rights that correspond to those identified in the ICCPR as being of most relevance to the conduct of MSOs, namely the right to life;¹⁴⁸ the right to humane treatment;¹⁴⁹ the right to personal liberty;¹⁵⁰ right to a fair trial;¹⁵¹ and the

¹⁴⁰ *ibid* art 34.

¹⁴¹ *ibid* art 44.

¹⁴² *ibid* art 46.

¹⁴³ On the American system, generally, see Jo Pasqualucci, 'The Americas' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, OUP 2014).

¹⁴⁴ Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 3 (OAS Charter).

¹⁴⁵ American Declaration of the Rights and Duties of Man, OAS Gen Ass Res 1591, Doc No AG/RES. 1591 (XXVIII-O/98) (2 June 1948).

¹⁴⁶ Pasqualucci (n 143) 399.

¹⁴⁷ As of July 2018, 23 of the 35 members of the OAS are States parties to the ACHR. 'American Convention on Human Rights, Signatories and Ratifications' (*Organization of American States*, 8 July 2018) <http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm> accessed 8 July 2018. Notably, the number of States Parties has reduced following the denunciations of Trinidad and Tobago in 1998 and Venezuela in 2012.

¹⁴⁸ ACHR (n 70) art 4.

¹⁴⁹ *ibid* art 5.

¹⁵⁰ *ibid* art 7.

¹⁵¹ *ibid* art 8.

freedoms of expression and assembly.¹⁵² However, as for the ECHR, the rights are framed using language unique, at least in part, to the ACHR.

The scope of application of the ACHR is limited, albeit in slightly different terms to either the ICCPR or ECHR. Under Article 1, States Parties ‘undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of the those rights and freedoms...’. As with the other instruments, the precise contours of this provision remain controversial.¹⁵³

The American system includes two distinct institutions. First, there is the Inter-American Commission on Human Rights (IACHR), which is as an organ of the OAS, in relation to which its ‘principle function [is] to promote the observance and protection of human rights and to serve as a consultative organ of the [OAS] in these matters.’¹⁵⁴ As such, it maintains a limited oversight role in relation to the implementation of human rights standards by all members of the OAS, including those that are not States Parties to the American Charter.¹⁵⁵ For States parties to the American Charter, the IACHR may consider allegations of violations of the Charter received from individuals, organisations and groups.¹⁵⁶ In addition, it has an optional jurisdiction to receive inter-State complaints.¹⁵⁷ While the principle aim is to reach a friendly settlement,¹⁵⁸ the IACHR is empowered to communicate its conclusions to the State(s) concerned¹⁵⁹ and may choose, in due course, to publish the report.¹⁶⁰

The second institution in the American system is the Inter-American Court of Human Rights (IACtHR), which considers cases submitted either by either the IACHR or States parties to the ACHR,¹⁶¹ for whom the jurisdiction of the Court

¹⁵² *ibid* arts 13, 15.

¹⁵³ See below ch 3.

¹⁵⁴ OAS Charter (n 144) art 106.

¹⁵⁵ Statute of the Inter-American Commission on Human Rights, OAS Gen Ass Res 447 (IX-0/79) (1 January 1980) art 18.

¹⁵⁶ ACHR (n 70) art 44.

¹⁵⁷ *ibid* art 45.

¹⁵⁸ *ibid* art 48(1).

¹⁵⁹ *ibid* art 50.

¹⁶⁰ *ibid* art 51(3).

¹⁶¹ *ibid* art 61.

is optional.¹⁶² Allegations must have been submitted and considered by the IACHR before the Court may exercise its jurisdiction. When the Court considers an admissible case, its judgment is both final¹⁶³ and binding.¹⁶⁴ The IACtHR has generated a considerable jurisprudence of its own; however, it has not yet dealt with as wide a range of issues as the IACHR or, indeed, the ECtHR. As a result, the decisions and views of the IACHR remain of significant relevance in the American system.

The African system has its roots in the Organization of African Unity, which was succeeded in 2002 by the African Union.¹⁶⁵ The main instrument is the ACHPR, which entered into force in 1986 and includes the main civil and political rights familiar from the ICCPR and other regional instruments. In addition, the ACHPR includes a number of rights intended specifically to protect the rights, including economic, social and cultural rights, of 'peoples' (as opposed to individuals).¹⁶⁶ However, of particular relevance to the conduct of MSOs, the ACHPR includes the right to life and integrity of the person;¹⁶⁷ the right to the respect of the dignity inherent in a human being, including the prohibition of torture and cruel, inhuman or degrading treatment or punishment;¹⁶⁸ the right to liberty and security of the person;¹⁶⁹ the right to a fair trial;¹⁷⁰ and the freedoms of expression and assembly.¹⁷¹ In contrast to the ICCPR, ECHR and ACHR, the ACHPR does not contain an express provision limiting its applicability.

As in the American system, the African system includes two protective institutions. The African Commission on Human and Peoples' Rights has a function similar to its equivalent in the American system. As well as considering

¹⁶² *ibid* art 62.

¹⁶³ *ibid* art 67.

¹⁶⁴ *ibid* art 68.

¹⁶⁵ On the evolution of the African system, see Shelton and Carozza (n 121) 157–58; Gino J Naldi, 'The African Union and the Regional Human Rights System' in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights* (2nd edn, CUP 2008). On the African system, generally, see Christof Heyns and Magnus Killander, 'Africa' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, OUP 2014).

¹⁶⁶ ACHPR (n 71) arts 19–24.

¹⁶⁷ *ibid* art 4.

¹⁶⁸ *ibid* art 5.

¹⁶⁹ *ibid* art 6.

¹⁷⁰ *ibid* art 7.

¹⁷¹ *ibid* arts 9, 11.

periodic reports submitted by States Parties,¹⁷² it is empowered to consider allegations of violations of the ACHPR submitted both by States Parties¹⁷³ and by individuals or other entities.¹⁷⁴ The Commission's findings will be communicated to the State(s) concerned,¹⁷⁵ but remain confidential until a decision is made to publish them by the Assembly of Heads of State and Government.¹⁷⁶ Common with other systems, the African Commission has published a number of General Comments and other soft law instruments intended to help guide States in their application of the ACHPR.

The Commission was the only institution created under the ACHPR itself. However, by virtue of a Protocol that came into force in 2004,¹⁷⁷ there now exists, in addition, an African Court on Human and Peoples' Rights, although the intention is that its functions will transfer to a combined African Court of Justice and Human Rights, of which one section will deal with human rights.¹⁷⁸ The Court has jurisdiction to hear cases submitted by the Commission, by African Intergovernmental Organizations, as well as by those States Parties that have one of three specified links to a case.¹⁷⁹ Optionally, States Parties may also permit individuals and non-governmental organisations direct access to the Court.¹⁸⁰ The Court's judgments are final¹⁸¹ and binding.¹⁸² However, the relatively limited jurisprudence generated so far by the African Court means that a great deal of reliance must still be placed on the views of the African Commission.

¹⁷² *ibid* art 62.

¹⁷³ *ibid* arts 47–49.

¹⁷⁴ *ibid* art 55.

¹⁷⁵ *ibid* art 52.

¹⁷⁶ *ibid* art 59.

¹⁷⁷ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) (Protocol to the African Charter).

¹⁷⁸ Protocol on the Statute of the African Court of Justice and Human Rights (adopted 1 July 2008, entered into force 11 February 2009).

¹⁷⁹ Protocol to the African Charter (n 177) art 5(1).

¹⁸⁰ *ibid* art 5(3).

¹⁸¹ *ibid* art 28(2).

¹⁸² *ibid* art 30.

1.1.4.4. Judicial dialogue between different systems

As is clear from the discussion above, the same substantive norm may be protected under several different IHRL treaties, subject to protection by different courts and treaty bodies. In light of this, there may be justified concern about fragmentation in the application of the same norm across different systems. Indeed, there is nothing in law to bind institutions within one system to decisions taken within another. As a result, it is not inevitable that the application of different instruments—as understood by different institutions—will necessarily be the same in dealing with the same issue. This can be seen, to some extent, in the differing ways in which different systems have approached the question of extraterritorial applicability, as discussed in Chapter Three. Nevertheless, more generally, ‘judicial dialogue’ between systems has ensured a high degree of coherence in the development of the law, and the avoidance of fragmentation.¹⁸³ The same phenomenon has been observed, to some extent, between human rights tribunals and domestic courts.¹⁸⁴

Because of this judicial dialogue, where gaps exist in the practice relating to a particular right under one system, it is legitimate to look to practice under others for guidance as to how the law in the former might develop. This is particularly pertinent with respect to a relatively young system, such as the African system, which has relied upon the richer jurisprudence of its much older European and American counterparts as it establishes itself.¹⁸⁵ It is also relevant in situations in which one system has considered a very specific issue, such as the application of a particular right in novel circumstances. Where that is the case, the decision will provide useful guidance as to how the same situation will be dealt with under other systems, so long as it is compatible with the relevant wider practice. In light of these considerations, subject to contrary indications, this thesis assumes coherency in the application and development of the law.

¹⁸³ See, for example, Maria Papaioannou, ‘Harmonization of International Human Rights Law through Judicial Dialogue’ (2014) 3 Cambridge J of Intl &man Comparative L 1037, 1043–47; Eduardo Ferrer Mac-Gregor, ‘What so we Mean when we Talk About Judicial Dialogue?: Reflections of a Judge of the Inter-American Court of Human Rights’ (2017) 30 Harvard Human Rights J 89, 99–106 (examining ‘horizontal’ interaction between the ECtHR and IACtHR).

¹⁸⁴ Mac-Gregor (n 183) 106–09 (referring to the ‘vertical’ relationship between the IACtHR and domestic courts in Latin America).

¹⁸⁵ Papaioannou (n 183) 1046.

Where, therefore, a particular court has applied a particular right directly to conduct comprising part of a MSO, that decision will generally be relied upon as an indication as to how the right would be applied in the same circumstances under the other systems.

1.1.4.5. The nature of human rights obligations

With some exceptions,¹⁸⁶ obligations contained in IHRL instruments are framed in broad terms. Generally, States must ‘respect’ the substantive rights and ‘ensure’ their application to individuals.¹⁸⁷ However, this has been translated into concrete duties not only to respect substantive rights, but also to *protect* individuals from violations of rights and to *fulfil* them.¹⁸⁸

The duty to respect is primarily negative, in that States generally must not violate substantive rights. The duty to protect, on the other hand, is essentially positive, requiring States to take reasonable action to protect individuals from the interference with their rights by third parties. Similarly, the duty to fulfil requires that States take positive action to give effect to rights. For example, some rights (such as the right to a fair trial) can only be fully realised through legislative implementation. Likewise, fulfilling prohibitive rights (such as the prohibition on torture) requires enactment of legislation providing for the criminalisation and punishment of the prohibited act. More broadly, rights will only be fulfilled if there exists a mechanism for victims of breaches to seek a remedy.

1.1.4.6. Limitations and derogations

The majority of human rights are not absolute. Only a very limited range including, for example, the prohibitions of torture and slavery are framed without caveat or limitation. The remainder are limited in a number of different ways.

¹⁸⁶ The specific provisions contained in CAT being a notable example.

¹⁸⁷ Frédéric Mégret, ‘Nature of Obligations’ in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, OUP 2014) 101–104.

¹⁸⁸ *ibid* 101–104; Dinah Shelton and Ariel Gould, ‘Positive and Negative Obligations’ in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 565–77.

Limitations can be set out in express or general terms, as illustrated by the different approaches to framing the right to life. Article 6(1) ICCPR states that 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.' At the regional level, both the ACHR¹⁸⁹ and ACHPR¹⁹⁰ follow the ICCPR in limiting the prohibition to only the *arbitrary* deprivation of life. The ECHR, however, takes a different approach, setting out the limitations on the right to life in express and apparently exhaustive terms.¹⁹¹

Rights may also be limited in general terms through the use of a clause similar to that which limits the right to respect for private and family life under the ECHR. According to Article 8(2):

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Equivalent provisions are found in other instruments and follow a distinctive formula. First, limitations to rights must be prescribed by law, rather than through arbitrary exercise of executive power. Second, rights must be limited only in order to achieve one of the legitimate objectives listed. Third, limitations must be necessary in a democratic society and, as such, be proportionate to the legitimate objective that is to be achieved.¹⁹²

As well as limiting particular rights, IHRL instruments generally permit States Parties to suspend certain obligations in exceptional circumstances. The exact provisions vary between instruments, but common characteristics can be identified.¹⁹³ First, not all rights are derogable. Those such as the prohibitions of torture and slavery must be respected in all circumstances. Second, derogation is permitted only in a very narrowly defined range of circumstances, related

¹⁸⁹ ACHR (n 70) art 4(1).

¹⁹⁰ ACHPR (n 71) art 4.

¹⁹¹ ECHR (n 69) art 2.

¹⁹² See, for example, Mégret (n 187) 112–13; Yutaka Arai-Takahashi, 'Proportionality' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013).

¹⁹³ Mégret (n 187) 113–14.

invariably to the existence of a state of national emergency. For example, under the ECHR, derogation is permitted only '[i]n time of war or other public emergency threatening the life of the nation...'.¹⁹⁴ Third, derogations are generally permitted only so long as such an emergency continues to exist. However, although MSOs may engage a number of derogable rights, this possibility is not considered further in this thesis.

1.1.4.7. Non-treaty sources of human rights law

As noted above, and explained in more detail below, this thesis will focus on the application of a specific selection of IHRL treaties. However, to explain that decision, and to place the thesis in context, this subsection outlines the complex area of non-treaty IHRL, before briefly examining the particularly uncertain matter of spatial applicability.

The subject of human rights presents a challenge to the traditional conception of customary international law, which is identified with reference to the twin requirements of State practice and *opinio juris*,¹⁹⁵ the latter explained by the ICJ as 'a belief that [a particular] practice is rendered obligatory by the existence of a rule of law requiring it.'¹⁹⁶ With regards to the first element, it is necessary that the relevant practice of States, 'including that of States whose interests are specially affected, should have been both extensive and virtually uniform', occurring 'in such a way as to show a general recognition that a rule of law or legal obligation is involved.'¹⁹⁷ It is not always necessary for the practice to have occurred over a long period of time,¹⁹⁸ and 'virtual uniformity' does not mean that there can have been no inconsistent State conduct. What is important is that 'the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally

¹⁹⁴ ECHR (n 69) art 15.

¹⁹⁵ Hugh Thirlway, *The Sources of International Law* (OUP 2014) 56–62.

¹⁹⁶ *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Merits) [1969] ICJ Rep 3 [77].

¹⁹⁷ *ibid* [74].

¹⁹⁸ *ibid*.

have been treated as breaches of that rule, not as indications of the recognition of a new rule.’¹⁹⁹

The process of identifying customary law is typically inductive,²⁰⁰ recognizing rules that have been ‘carefully hammered out on the anvil of actual, tangible interaction among States’.²⁰¹ Human rights norms do not lend themselves easily to such a process. By their nature, human rights manifest themselves first and foremost through the interaction between States and individuals, rather than between States. According to the traditional view, individuals are not subjects of international law and their interactions with States therefore cannot directly amount to State practice.²⁰² As a result, there is much reduced potential for the sort of inter-State interaction traditionally required for the creation of customary law.²⁰³ This presents a challenge for those who advocate for a broad catalogue of human rights that have attained customary status. While the ends sought might be (to some) laudable—the elevation in status of human rights above and beyond the realm of mere treaty law—the law imposes significant obstacles.

Recognizing the difficulty in reconciling the available evidence with the traditional requirements of customary law, some have argued that binding non-treaty human rights norms are derived from a novel source of international law not dependent on State consent.²⁰⁴ Henkin, for example, suggested that there

¹⁹⁹ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 [186].

²⁰⁰ Stefan Talmon, ‘Determining Customary International Law: The ICJ’s Methodology between Induction, Deduction and Assertion’ (2015) 26 *Eur J of Intl L* 417, 421.

²⁰¹ Bruno Simma and Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles* (1989) 12 *Australian YB of Intl L* 82, 89.

²⁰² Thirlway (n 195) 176–77.

²⁰³ Simma and Alston (n 201) 99; Thirlway (n 195) 177–78.

²⁰⁴ Oscar Schachter, *International Law in Theory and Practice* (Kluwer, 1991) 342. As Schachter notes, some jurisprudential foundation for this idea is found in the Judge Tanaka’s dissenting opinion in the second phase of the *South West Africa* cases, in which he said: ‘The principle of the protection of human rights is derived from the concept of man as a person and his relationship with society which cannot be separated from universal human nature. The existence of human rights does not depend on the will of a State; neither internally on its law or any other legislative measure, nor internationally on treaty or custom, in which the express or tacit will of a State constitutes the essential element.’ *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)*

instead exists a 'non-conventional' law of human rights derived from the content of liberal national constitutions. Such law, he argued, 'is not based on consent: at least, it does not honor or accept dissent, and it binds particular states regardless of their objection.'²⁰⁵ However, while they might make for effective rhetoric, this and other radical theories are ultimately unconvincing as statements of the law.²⁰⁶

Some have looked to other, established, sources of international law. Simma and Alston, for whom the evidence supporting a broad body of customary human rights law is irreconcilable with the traditional requirements of State practice and *opinio juris*,²⁰⁷ proposed instead that human rights norms be recognized as 'general principles of law recognized by civilized nations'.²⁰⁸ While such general principles are more commonly thought to originate in domestic legal systems,²⁰⁹ Simma and Alston argue that the concept can be

(*Second Phase*) (Dissenting Opinion of Judge Tanaka) [1966] ICJ Rep 250, 297.

²⁰⁵ Louis Henkin, 'Sibley Lecture, March 1994 Human Rights and State "Sovereignty"' (1996) 25 Georgia J of Intl & Comparative L 31, 38. Similar arguments had earlier been acknowledged by Schachter.

²⁰⁶ Dealing specifically with the case put forward by Henkin, D'Amato points out that deriving international law from domestic constitutions is not only without precedent, but also that Henkin fails to explain why only 'liberal' constitutions are to be considered; how liberal constitutions are to be identified as such; and why the rights he seeks to identify actually appear so infrequently. Anthony D'Amato, 'Human Rights as Part of Customary International Law: a Plea for Change of Paradigms' (1996) 25 Georgia J of Intl & Comparative L 47, 53–55.

²⁰⁷ Simma and Alston (n 201) 99–100. Simma and Alston do not 'suggest that there are no human rights norms that are capable of satisfying the appropriate criteria for the creation of customary law. Indeed it may well be that, in relation to many of the rights contained in the *Restatement* list, a strong case could be made which also takes careful account of the concerns expressed above. The point that we wish to make, however, is that the resulting list will inevitably be brief and will certainly constitute an unsatisfactory basis on which to achieve many of the goals appropriately sought by the strongest proponents of international human rights law.' *ibid* 100.

²⁰⁸ *ibid* 102–6. This is another of the sources of international law identified in the ICJ Statute. Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (ICJ Statute) art 38(1)(c).

²⁰⁹ Thirlway (n 195) 95. As Thirlway notes, this particular interpretation is supported by the equivalent formulation set out in article 21(1)(c) of the Statute of the International Criminal Court: 'general principles of law derived by the Court from national laws of legal systems of the world'. However, the sources listed in the Rome Statute do not map perfectly to those in the ICJ Statute, the former also recognising 'the principles and rules of international law' under a separate head from 'general principles of law'. Rome Statute of the International

expanded to embrace substantive principles identified directly from pronouncements of States at the international level.²¹⁰ As long as such principles are given 'sufficient expression in legal form',²¹¹ a requirement apparently satisfied in this context by evidence similar to that used in the modern approach to customary law, discussed below, no State practice need be demonstrated. According to this reasoning, non-treaty human rights norms can be identified using the same evidence proposed as supporting a body of customary human rights law, but without the methodological difficulties.²¹²

While some human rights norms probably do have the status of general principles on account of their prevalence in domestic legal systems, such as certain due process rights,²¹³ Simma and Alston's broader proposition has not won significant support.²¹⁴ Thirlway questions whether the material that Simma and Alston rely upon to derive a wide-ranging human rights law based on general principles really satisfies their own criteria.²¹⁵ While such material—declarations, resolutions etc.—often purports to deal with matters of law, it is not usually legally binding in character and there must be doubt, therefore, whether

Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 art 21(1).

²¹⁰ Simma and Alston (n 201) 102, 105.

²¹¹ The language used by Simma and Alston is that of the International Court of Justice. *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)* (Second Phase: Judgment) [1966] ICJ Rep 4, 34.

²¹² 'Consequently, what is required for the establishment of human rights obligations *qua* general principles is essentially the same kind of convincing evidence of general acceptance and recognition that Schachter asks for—and finds—in order to arrive at customary law.' Simma and Alston (n 201) 105 (citation omitted).

²¹³ Writing in 1989, Meron predicted that 'As human rights norms stated in international instruments come to be reflected in national laws, especially in provisions for the administration of justice and due process, Article 38(1)(c) [of the ICJ Statute] will increasingly become one of the principal methods for the maturation of such standards into the mainstream of international law.' Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon, 1989) 88. However, this derivation of general principles from the incorporation of human rights norms in domestic law is much narrower than the mechanism proposed by Simma and Alston.

²¹⁴ The 1994 Symposium was held not long after the publication of Simma and Alston's article and, while their critique was dealt with only in passing, the consensus is reported to have been to reject it. Richard B Lillich, 'The Growing Importance of Customary International Human Rights Law' (1996) 25 Georgia J of Intl & Comparative L 1, 18.

²¹⁵ Thirlway (n 195) 181.

it amounts to 'sufficient expression in legal form'. More fundamentally, Simma and Alston fail to provide sufficient evidence to prove that it is to general principles, rather than customary law, that courts in fact turn to identify non-treaty human rights law. They rely on the failure of the ICJ to state explicitly its reliance on customary international law when identifying non-treaty human rights law.²¹⁶ However, the most that can be said is that the ICJ has avoided identifying the sources on which it has relied using the language contained in the ICJ Statute. While the ICJ has not referred explicitly to customary international law as a source of human rights norms, it has not referred explicitly to general principles of law either, at least not clearly in the sense of Article 38(1)(c) of the ICJ Statute.²¹⁷ Furthermore, domestic courts *do* refer to customary human rights law.²¹⁸ Therefore, while Simma and Alston's theory would, if correct, sidestep some difficult issues relating to the identification of customary human rights norms, it does not amount to a convincing alternative.

For those arguing for an expansive body of *customary* human rights law, a common notion is that human rights norms are, or ought to be, subject to a 'modern' approach.²¹⁹ The meaning of 'modern' varies according to the writer, although it can usually be assumed to imply some dilution of the traditional requirements of State practice and *opinio juris*. In contrast to the inductive traditional method, those adopting a modern approach usually look instead to deduction, by which it is meant that custom is deduced from 'general statements of rules, rather than particular instances of practice.'²²⁰ However, this explanation is arguably the result of a misunderstanding of the deductive method and a misreading of the ICJ's jurisprudence on this methodological point.²²¹ More convincing is the argument that a broader range of evidence

²¹⁶ Simma and Alston (n 201) 105–6.

²¹⁷ Thirlway (n 195) 181.

²¹⁸ Lillich (n 214) 17–18.

²¹⁹ The terms 'traditional' and 'modern' are here used according to the meanings ascribed to them in Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 AJIL 757, 758–59.

²²⁰ *ibid* 758.

²²¹ Talmon (n 200) 429–34. Talmon makes clear that deductive reasoning is, and has been for a long time, a legitimate method for avoiding a *non liquet* in situations where the inductive approach for some reason fails, such as where there is insufficient State practice; where the practice is too disparate; where *opinio juris* cannot be established; and where practice and *opinio juris* are in

ought to be accepted as proof of State practice and *opinio juris* than is usually the case. Such evidence potentially includes multilateral treaties; resolutions of the United Nations General Assembly; national constitutions; and other declarations from which States' attitude to human rights norms can be inferred.²²² However, the theory underpinning the acceptance of these unusual types of evidence is controversial, and has been the subject of ongoing discourse and debate.²²³ Even if the approach is valid, it is problematic in that it can be deployed to support widely differing positions.

For example, it is often argued that the UDHR, in its entirety, reflects customary law, a proposition with a long pedigree, dating back as far the Declaration's adoption.²²⁴ It appears in numerous declarations, national constitutions and

conflict. Talmon (n 200) 422. In these situations, deduction can be used either alone, to infer 'by way of legal reasoning,...a specific rule from an existing and generally accepted...rule or principle', or alongside induction to either 'lower the standard of inductive evidence' or tip the balance in an otherwise irresolvable case. *ibid* 420, 427-28. According to Talmon, the deductive approach is not an alternative available to achieve some moral objective; it is available only when induction fails. *ibid* 430-31.

The deductive method is certainly relevant to the determination of human rights, but it is not an option that can be chosen freely to displace the traditional requirements of State practice and *opinio juris*. Moreover, recourse to deduction is limited by the need to identify settled general rules from which to infer the specific. As Talmon stresses, it is 'important that new rules of customary international law are deduced only from existing legal rules or principles and not from postulated values.' *ibid* 430-31. While some principles relevant to human rights law have been identified by the ICJ—the 'elementary considerations of humanity' invoked in the *Corfu Channel* case, for example (*The Corfu Channel Case (Merits)* [1949] ICJ Rep 4, 22)—such status does not necessarily attach to, for example, General Assembly resolutions. It is therefore incorrect to suggest that the deductive approach somehow permits the deduction of customary law from these and other similar declarations *per se*.

²²² Schachter (n 204) 336.

²²³ At one extreme, some writers consequently consider the body of non-treaty human rights norms derived on this basis to be very small indeed. Weisburd, for instance, places great emphasis on States' enforcement of norms as a pre-requisite for their attaining customary status. He argues that for a norm to attain customary status, States must 'refuse to acquiesce in a breach of the norm, but on the contrary actively seek to reverse the effects of the breach.' From what he considers to be the absence of such enforcement, he concludes that 'labelling such norms rules of customary law would appear to be a contradiction in terms.' Arthur M Weisburd, 'The Effect of Treaties and Other Formal International Acts on the Customary Law of Human Rights' (1996) 25 Georgia J of Intl & Comparative L 99, 103.

²²⁴ Simma and Alston (n 203) 84; Schabas (n 76) cxix. An alternative argument for binding nature of the Universal Declaration of Human Rights is through its

scholarly works.²²⁵ For example, in 1968, the Final Act of the Tehran International Conference on Human Rights stated that the UDHR represents ‘a common understanding of the people of the world concerning the inalienable rights of all members of the human family and constitutes an obligation for the members of the international community’.²²⁶ The notion also enjoys a degree of support in the jurisprudence of the ICJ.²²⁷ For example in the Iran Hostages case, the Court referred to ‘fundamental principles enunciated in the Universal Declaration of Human Rights.’²²⁸ Yet, the view that the UDHR can be considered reflective of customary law, in its entirety, remains in the minority.²²⁹ Such simplistic invocations of the UDHR fail to differentiate between different rights and to assess States’ attitude and practice to each individually. As Hannum concludes, ‘Unless one wishes to interpret the proposed customary international law norm as merely expressing general agreement with the desirability of the principles in the Declaration, it would appear difficult to make

‘authoritative interpretation’ of the obligations under Articles 55 and 56 of the United Nations Charter. This argument was championed, in particular, by Sohn. Louis B Sohn, ‘The New International Law: Protection of the Rights of Individuals Rather than States’ (1982) 32 American U L Rev 1, 16–17. See also Thirlway (n 195) 179. However, it is an idea dating back to the period of the UDHR’s drafting. Schabas (n 76) cxix. Under Article 55, ‘the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.’ Under Article 56, members of the United Nations ‘pledge to take joint and separate action in co-operation with the [UN] for the achievement of the purposes set forth in Article 55.’ Given the origins and subject matter of the UDHR, the argument does make sense as a matter of treaty law in the interpretation of the phrase ‘human rights and fundamental freedoms’. Sohn, however, takes the argument further to assert that ‘[t]he Declaration, as an authoritative listing of human rights, has become a basic component of international customary law, binding on all states, not only members of the United Nations.’ Sohn (n 224) 17. This, arguably, takes the point too far. It does not necessarily follow from the UDHR’s suggested importance with respect to Article 55 that the UDHR must necessarily have become customary law in its own right. Thirlway (n 195) 179.

²²⁵ For a detailed survey see Hurst Hannum, ‘The Status of the Universal Declaration of Human Rights in National and International Law’ (1996) 25 Georgia J of Intl & Comparative L 287, 317–35.

²²⁶ ‘Final Act of the International Conference on Human Rights, Teheran’ (13 May 1968) UN Doc A/CONF.32/41, 3.

²²⁷ Hannum (n 225) 335–39.

²²⁸ *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Merits) [1980] ICJ Rep 3, 42.

²²⁹ This was the conclusion of Hannum in 1996 and remains, in the view of the author, the case today. Hannum (n 225) 340; Kälin and Künzli (n 73) 71.

the case that states recognize an international legal obligation to guarantee e.g. periodic holidays with pay, full equality of rights upon dissolution of a marriage, or protection against unemployment.²³⁰

Ultimately, even if a liberal approach is taken to the process of identifying customary law, what is needed is a detailed examination of each right to determine the strength of the case for its being considered customary in nature. Such an assessment should consider all of the relevant evidence and not dwell on sweeping generalisations. While it is plausible that the UDHR could become reflective of customary law in its entirety, that conclusion should be based on more detailed evidence than simple invocations of the instrument as a whole. However, when such an exercise is carried out, the result is usually a core of rights for which a sound case may be made for their customary status, together with a penumbra of those that may exist as treaty norms elsewhere, or not as legal norms at all.²³¹

An influential analysis, particularly in the United States, is that which is set out by the American Law Institute in its *Restatement of the Law Third of the Foreign Relations Law of the United States*. According to the *Restatement* '[a] state violates international law if, as a matter of state policy, it practices, encourages or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.'²³² While the evidence presented in support of the *Restatement's* conclusions is of a non-traditional nature—largely treaties, declarations, national constitutions and domestic Court decisions—individual rights are considered on a case-by-case basis. As a result, it at least manifests a degree of rigour and, by virtue of its relatively conservative

²³⁰ Hannum (n 225) 340 (citations omitted).

²³¹ *ibid* 340–51.

²³² American Law Institute, *Restatement of the Law Third, Restatement of the Law, The Foreign Relations Law of the United States* (American Law Institute Publishers 1987) vol 2 para 702. To illustrate the ALI's approach, the prohibition on torture is supported by reference to the UDHR; to several universal and regional human rights treaties; to national constitutions; to the judgments of domestic courts; and to the jurisprudence of the ECtHR.

approach, establishes a core of relatively uncontroversial rights.²³³ Some may not necessarily agree on the detail of its conclusions; Meron, for example, would have added certain due process guarantees, the right of self-determination and the obligation to treat detainees humanely,²³⁴ but its basic premise seems sound.

As well as the enduring controversies surrounding methodology and the ultimate scope of customary (or other non-treaty) human rights law, a common feature of all these analyses is the broad terms in which they state their conclusions. As typified by the *Restatement*, each approach generally yields only a list of rights framed in terms similar to that of the UDHR—simply a ‘right to X’ or a ‘prohibition of Y’. While alternative methods may result in different lists, they go into no greater detail as to what each particular right entails. This is perhaps unsurprising since the evidence relied upon to identify customary human rights law typically is similarly vague. If a customary norm is rooted in a broadly framed principle then, without concrete State practice from which to identify more detailed parameters, that is all that the customary rule can be based on.

Summarising this complex situation, although certain rights are arguably well-evidenced, and may, on close analysis, give rise to concrete obligations on the part of States, non-treaty IHRL appears, on the whole, to comprise a poorly defined set of rights with uncertain content. Furthermore, however clearly (or not) non-treaty IHRL is defined, the ability for it to be relied upon in practice is inevitably limited in comparison with treaty-based IHRL. There is no defined complaint procedure according to which non-treaty IHRL rights can be enforced; and, even though they may be recognised and applied by courts and other tribunals, as for other rules of international law, this depends upon the availability of a right of recourse to the body in question. Moreover, unless a State’s domestic courts recognise non-treaty IHRL, the potential for individuals to complain of violations is likely to be very limited indeed. Therefore, although there are examples, including some within the topic under examination, where courts and tribunals have applied (or considered as applicable) non-treaty IHRL norms, the availability of direct enforcement mechanisms, together with the

²³³ Kälin and Künzli (n 73) 70–71.

²³⁴ Meron (n 213) 95–96.

certainty of the rules themselves, affords treaty-based IHRL a particular relevance.

Notwithstanding these issues, a conceivable reason for seeking to rely on non-treaty IHRL might be the argument that they, or a significant subset, necessarily apply extraterritorially. As explained in Chapter Three, this is a controversial issue with respect to the IHRL treaties under consideration and, with even the most liberal interpretation of the treaty provisions in question, there are situations in which they do not apply. As a result, the proposition that the same rights are protected by custom, without the same limitations, is undoubtedly attractive. In the view of the present author, however, this view is unconvincing, although it is admittedly an area that has received little attention.

Such consideration as there has been has tended to consider the extraterritorial application of customary human rights law as a whole, or at least according to broad categorisations. Lubell argues that ‘the fact that all states are obligated to strive towards universal protection [of fundamental human rights] clearly indicates that they should not be taking steps in the opposite direction by violating human rights in other countries.’²³⁵ Lubell’s argument rests on the assumption that customary human rights—at least those within his contemplation—are owed *erga omnes*, and that it necessarily follows from this that there is no spatial limit to their applicability. He argues that ‘if state A is to have a vested interest in state B’s protection of human rights within state B, it cannot at the same time be allowed to send agents into state B and commit the same violations for which it could be admonishing state B were it to commit them itself.’ Even if correct, this analysis is limited only to those rights that properly can be considered as being owed *erga omnes*; and, even then, it could only make sense with respect to negative obligations.²³⁶

There are, it is submitted, two fundamental problems with broad propositions as to the extraterritorial applicability of customary human rights law. First, such arguments take customary human rights law to be a homogenous whole,

²³⁵ Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP, 2010) 234.

²³⁶ Lubell concedes that ‘States...are limited legally and practically in their power and authority to take positive actions in the territory of other states.’ *ibid* 234.

susceptible to large-scale arguments of principle in determining questions such as its extraterritorial applicability. Such an approach is symptomatic of a detachment, explained above, from the established rules of customary law formation. Despite suggestion to the contrary, customary human rights law is not subject to its own special rules of formation. While it necessarily draws on non-traditional sources—treaties, UN General Assembly resolutions, etc.—it must still ultimately conform to the established requirements of custom. The reliance on non-traditional sources does, however, mean that the customary status of a human rights norm can be difficult to determine. For example, where the evidence for a norm relies in large part on its inclusion in a number of widely ratified treaties, it is hard to differentiate between a State's conduct pursuant to its treaty obligations and that which is accompanied by genuine *opinio juris* such as to demonstrate the existence of a customary norm. Nonetheless, proper analysis must be conducted to understand whether a particular norm has achieved customary status.

Second, they assume that it is enough to consider rights broadly framed—the right to life, for example. Yet it means little to identify that there is a particular customary right, without also identifying what that right entails—the specific duties and obligations, including the rules of application, that describe how the right is actually manifested in law. These detailed rules must also be identified according to the established requirements of custom—State practice and *opinio juris*. While it will be relevant to consider the express content of treaty provisions, as well as the related practice of courts and treaty bodies, a customary right will not necessarily track the corresponding right under treaty law. Not only is human rights law too fragmented for this to be the case—the right to life, for example, carries different obligations under different treaty regimes²³⁷—but it is the practice of *States*, and not directly that of courts or treaty bodies, that creates custom.

Turning specifically to the question of extraterritorial application, it may be that certain customary human rights norms have an existence wholly independent of equivalent treaty rules, particular where the treaty merely reflects a pre-existing customary rule, which may have a broader application than the treaty. However,

²³⁷ Note, for example, the different formulations for the right to life contained in art 2 ECHR and art 6 ICCPR.

more generally, as Milanovic notes, ‘it does not seem at all possible to disentangle the territorial limitations of human rights as prescribed in treaties from any customary substantive rules of human rights law. In other words, it is quite unlikely that states have assumed more extensive obligations under customary human rights law than they have done under treaty law.’²³⁸ What this means, is that if the formation of a customary norm is evidenced—in whole or in part—by the treaty provisions protecting it, then the spatial scope of those treaty provisions must be taken into account when considering the spatial scope of application of the associated customary norm. Furthermore, decisions of Courts and treaty bodies in interpreting the spatial scope of application of treaty rules cannot be assumed to apply necessarily to corresponding customary rules. It may also be that only some aspects of a particular customary right—i.e. a subset of obligations—will apply extraterritorially and, even if a particular obligation does apply extraterritorially, it remains to be determined whether there are criteria that further restrain such application. The ultimate point is that a detailed enquiry must be conducted, and a broad assumption as to the extraterritorial applicability of customary IHRL is, it is submitted, misplaced.

1.1.5. Human rights in the maritime domain

Human rights are manifested in the maritime domain in a number of different ways. First, some human rights norms have arguably been incorporated directly into the law of the sea; or, to put it another way, some law of the sea rules might reasonably be described as reflecting, human rights norms. For example, Oxman asserts that UNCLOS ‘is not ordinarily considered a human rights instrument. With few exceptions, its role in advancing human rights is not obvious or direct. But neither is it negligible.’²³⁹ Specifically, Oxman cites provisions of UNCLOS as contributing to: the rule of law, through its limitation on powers such as universal jurisdiction over acts of piracy;²⁴⁰ community rights, including its provisions on the international seabed area, and protection

²³⁸ Milanovic (n 64) 3.

²³⁹ Bernard H Oxman, ‘Human Rights and the United Nations Convention on the Law of the Sea’ (1998) 36 *Columbia J of Transnational L* 399, 401. See also Tullio Treves, ‘Human Rights and the Law of the Sea’ (2010) 28 *Berkeley J of Intl L* 1; Sophie Cacciaguidi-Fahy, ‘The Law of the Sea and Human Rights’ (2007) 19 *Sri Lanka J of Intl L* 85.

²⁴⁰ Oxman (n 239) 402-404.

of the environment and cultural heritage;²⁴¹ distributive justice through, for example, its protection of the rights of geographically disadvantaged States;²⁴² the protection of life at sea through the duty to rescue;²⁴³ property rights;²⁴⁴ rights related to communication;²⁴⁵ and individual rights of liberty and procedural due process.²⁴⁶ As this thesis will demonstrate, however, the law of the sea includes only a sparse selection of norms protected by IHRL treaties, not least those engaged in the course of MSOs.

Second, courts and tribunals have interpreted the law of the sea in light of human rights norms. For example, as noted above, a significant lacuna in the law of the sea, at least in treaty law, is the absence of rules governing the use of force during the interdiction of vessels. The resolution of this issue by the International Tribunal on the Law of the Sea (ITLOS) illustrates the influence, if not incorporation, of human rights norms. In *M/V Saiga No. 2*, discussed in detail in Chapter Four, the Tribunal referred to general international law to address the gap in UNCLOS, noting that, ‘Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.’²⁴⁷ While the Tribunal did not refer specifically to human rights law, the requirement it identified, ‘that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances’,²⁴⁸ arguably reflects human rights norms. More explicitly, the arbitral tribunal convened under UNCLOS in the *Arctic Sunrise* case, considered in detail in Chapter Eight, determined that

in relation to the interpretation and application of the Convention, the Tribunal may, therefore, pursuant to Article 293, have regard to the extent necessary to rules of customary international law, including international human rights standards, not incompatible with the Convention, in order to

²⁴¹ *ibid* 404-411.

²⁴² *ibid* 411-414.

²⁴³ *ibid* 414-415.

²⁴⁴ *ibid* 415-419.

²⁴⁵ *ibid* 419-420.

²⁴⁶ *ibid* 421-429.

²⁴⁷ *M/V ‘Saiga’ (No 2) (Saint Vincent and the Grenadines v Guinea)* (Merits, Judgment of 1 July 1999) ITLOS Reports [155].

²⁴⁸ *ibid* [155].

assist in the interpretation and application of the Convention's provisions that authorise the arrest or detention of a vessel and persons.²⁴⁹

As explained above, however, uncertainty as to the scope and content of customary IHRL, together with the limited options for seeking recourse for alleged violations, particularly by individuals, means that the impact of IHRL incorporated by these means may be limited.

Finally, obligations arising under IHRL treaties may be applied directly to activities in the maritime domain, including the conduct of MSOs. This is, in some cases, a relatively uncontroversial proposition. That MSOs involve activities, such as detention and the use of force, that are of a nature to engage human rights obligations is unarguable. In numerous instances, discussed in detail in subsequent chapters, courts and monitoring bodies have applied IHRL rules to particular aspects of MSOs. For example, to cite one particularly prominent decision, the ECtHR in 2010 ruled in the case of *Medvedyev v France* that ECHR provisions relating to detention applied to individuals detained at sea in a French warship following the interdiction of their vessel.²⁵⁰ The application of IHRL to MSOs has received some attention in the literature, both in general terms,²⁵¹ and with respect to specific issues. Particularly prominent has been consideration of the applicability of IHRL norms to the detention, transfer and prosecution of suspected pirates.²⁵²

The extent to which treaty-based IHRL regulates MSOs remains controversial, however. In particular, and as will be explained in Chapter Three and expanded upon throughout this thesis, the threshold issue of extraterritorial applicability is both contentious and of fundamental importance. A narrow conception of the extraterritorial applicability of IHRL would exclude its application to a substantial class of MSOs that occur seaward of States' territorial waters. Conversely, a

²⁴⁹ *The Arctic Sunrise Arbitration (The Kingdom of the Netherlands v The Russian Federation)* (Merits) PCA Case No 2014-02 (14 August 2015) [198].

²⁵⁰ *Medvedyev and Others v France* ECHR 2010. See below chs 3, 5.

²⁵¹ See, for example, Papastavridis (n 60) 73–80; Treves (n 239) 7–12; Guilfoyle, *Shipping Interdiction and the Law of the Sea* (n 43) 268–71; Brian Wilson, 'Human Rights and Maritime Law Enforcement' (2016) 52 *Stanford J of Intl L* 243.

²⁵² See, for example, Douglas Guilfoyle, 'Counter-Piracy Law Enforcement and Human Rights' (2010) 59 *Intl & Comparative L Q* 141, 152–67; Geiß and Petrig (n 58) 101–14.

broad understanding of extraterritorial applicability, such as this thesis will argue best reflects the law, brings many aspects of the execution of MSOs within the scope of IHRL. Resolving this pivotal issue involves both an understanding of the underlying law, and a detailed analysis of its application to specific situations encountered in the course of MSOs.

Beyond the question of applicability of IHRL, practice relating to its application in the maritime in general, and to MSOs in particular, remains relatively sparse in comparison to that which exists with respect to other contexts. While IHRL may apply to activities that comprise MSOs, *how* it does so must be considered in light of factors unique to the maritime environment. The limited practice that exists with respect to the application of IHRL directly to MSOs provides important, though incomplete, insight. At least as important, however, is the translation to the maritime of principles that are already well-established in other contexts.

1.2. Methodology

This thesis is concerned primarily with the last of the three ways, set out above, in which IHRL may apply in the maritime domain, namely the direct application of obligations arising under IHRL treaties. Although IHRL norms may be applied in the other ways described, treaty-based IHRL operates as a clearly defined set of rules, enforceable through (relatively) accessible mechanisms. Its applicability, or otherwise, to a State activity, such as MSOs, is therefore of specific interest and importance. While customary law may also contain human rights norms, as the discussion above explained, both their content and scope of application are likely to be unclear, and avenues for enforcement may be limited. Furthermore, to the extent that the content of customary IHRL *can* be determined, according to the ‘modern approach’ explained above, it is likely to reflect norms found in treaty-based IHRL.

This thesis argues that treaty-based IHRL (referred to hereafter simply as IHRL) provides an important normative framework within which MSOs are to be conducted, both within and beyond States’ maritime territories. It is argued that, although the extraterritorial applicability of IHRL is often complex and controversial, human rights obligations will almost invariably be engaged by the activities that constitute MSOs, albeit that some differences admittedly may

arise between those that are conducted within and beyond a State's territory. These obligations are to be met above and beyond those contained elsewhere in international law, particularly the law of the sea. Even where human rights principles can be argued to have already been reflected in the application of those other bodies of law, as is the case with respect to the use of force under the law of the sea, the obligations engaged by virtue of the direct application of IHRL are substantially broader in scope and greater in depth.

Nevertheless, IHRL does not operate in isolation; as this thesis demonstrates, its relationship with the law of the sea is particularly important. From one perspective, IHRL provides the normative framework in which MSO activities permitted by the law of the sea are to be conducted, either through the direct application of IHRL, or through the influence of IHRL on the development of law of the sea rules. From the opposite perspective, the law of the sea provides the basis for the lawful limitation of human rights in the course of MSOs. Understanding these relationships is of fundamental importance in understanding the application of IHRL to MSOs.

With respect to research methodology, this is a doctrinal study,²⁵³ concerned primarily with IHRL. To the extent that other bodies of law are relevant as comparators, or through their links to IHRL, they are also considered to the extent necessary. However, even within IHRL, a wide range of instruments, containing a very wide range of rights and obligations, may be relevant. As a result, a degree of selectivity is therefore necessary in order to prevent the analysis from becoming unwieldy. For this reason, the thesis focuses on four key instruments: the ICCPR, ECHR, ACHR and ACHPR. The ICCPR is of particular importance because it contains a comprehensive set of rights applicable to MSOs, because it is so widely adopted and because it is supported by considerable relevant practice, albeit non-judicial in character. The others represent the most important regional treaties, each containing a comprehensive set of rights, and each subject to a sophisticated enforcement mechanism that includes recourse to a court established for the purpose. Of these, the ECHR is of special interest because it has the richest jurisprudence,

²⁵³ On the meaning of this categorisation of legal research, see, for example, Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin L Rev* 83, 101–05.

including a number of important cases that have applied ECHR provisions directly to MSOs. In addition to the four treaties that contain catalogues of rights, the CAT is also considered in the particular circumstances where it is relevant.

Of the many rights protected under these instruments, the thesis considers only those that are particularly likely to be engaged in the course of MSOs, and concentrates its analysis on situations where the application of IHRL is most novel and/or contentious. For example, it is relatively uncontroversial that certain IHRL rules prohibit torture and other forms of ill-treatment with respect to individuals detained on board a ship flagged to the State in question. Therefore, while of undoubted importance in a practical sense, the thesis mentions this area only briefly. In contrast, the application of IHRL to the use of force in the course of MSOs is both important, involving conduct central to the execution of many MSOs, and controversial; hence it is subject to detailed analysis. Selectivity is also necessary in determining the aspects of each right to be considered in detail. Each of the rights considered in the course of the thesis may be subject to considerable practice and academic discourse, which cannot possibly be reflected in full within the limits of this thesis. The law is therefore explained and analysed to the detail necessary to support the central argument, without necessarily setting out every aspect of each right under examination.

With these points in mind, the thesis addresses a series of questions related to the core argument set out above:

- What are the activities undertaken in the course of MSOs that are most likely to engage IHRL obligations?
- How are those activities regulated by other bodies of international law, especially the law of the sea?
- In what circumstances can IHRL apply to those activities, if at all?
- What are the relevant IHRL rules and norms, and how do they apply to the specific activities that comprise MSOs?
- How does the regulation of MSOs by IHRL compare to its regulation by other bodies of law, and what are the links between the different legal regimes?

The third of these questions, relating to the applicability of IHRL to the activities that comprise MSOs, is a critical threshold issue. If IHRL applies to MSOs only in very limited circumstances, depending, for example, on the physical location in which a particular MSO occurs, then the importance of IHRL as a normative framework for MSOs would be significantly diminished. Understanding the applicability of IHRL to MSOs is important, therefore, both in defining the contours of the normative framework provided by IHRL, as well as to appreciate how significant that normative framework is to the practical execution of MSOs. The first two of the following chapters therefore focus on the question of applicability; Chapter Two is concerned with the applicability of IHRL to MSOs within a State's territory, while Chapter Three considers the more controversial issue of extraterritorial applicability. The aim of these chapters, particularly Chapter Three, is to establish the principles according to which specific IHRL rules will apply to particular activities that comprise MSOs. Later chapters then draw on the framework thereby established in order to inform the detailed analysis of particular IHRL rules and norms contained in the remainder of the thesis.

Having addressed the question of applicability, each subsequent chapter addresses a particular aspect of MSOs: the use of force; deprivation of liberty; rescue; *non-refoulement*; and the policing of protest. These have been selected as areas in which the conduct of MSOs is particularly likely to engage IHRL obligations. While they are not exhaustive in enumerating all of the areas in which IHRL might apply to MSOs, they represent what are submitted to be the areas of most relevance and adequate, at least, to prove the importance of the normative framework provided by IHRL.

The structure of these chapters varies in order to best deal with the issues at hand. In outline, each presents relevant practice concerning the execution of MSOs to the extent necessary to illustrate the topic under consideration, drawing, for example, on official sources or the facts of cases on point.²⁵⁴ The analysis then continues with an explanation of how the particular activities

²⁵⁴ Noting, however, that the thesis does not present a comprehensive account of such practice, and is not intended to judge the compatibility of specific MSOs with IHRL.

involved find their legal basis in, or are subject to regulation by, other bodies of international law, especially the law of the sea.

Each chapter then turns to IHRL, drawing first, to the extent necessary, on the analysis contained in Chapters Two and Three to address the applicability of IHRL in the context of the specific activities concerned. Next, the relevant IHRL norms and rules are explained, before an examination of how they apply in the context of MSOs. This is achieved both through analysis of case law, where available, that deals directly with the application of the rules in question to MSOs, as well as through inductive reasoning to extrapolate from their application in other contexts. The aim of this analysis is, for each aspect of MSOs under examination, an account of how the activities concerned are regulated by IHRL. The conclusion of each chapter includes an assessment of how the normative framework provided by IHRL relates to other relevant bodies of international law. This includes consideration both of the role that IHRL plays in regulating MSOs, above and beyond that which exists elsewhere in the law, as well as of the linkages between IHRL and other legal regimes. These conclusions are drawn together in a final chapter, which seeks to answer the questions set out above and to explain how those answers prove the core thesis.

2. The Applicability of International Human Rights Law to Maritime Security Operations Conducted in a State's Territory

2.1. Introduction

Before examining how substantive International Human Rights Law (IHRL) norms apply to maritime security operations (MSOs), it is essential first to understand the applicability of the IHRL treaties under consideration in a maritime context and, in particular, to MSOs. This is a key threshold issue of substantial complexity. MSOs can take place both in areas over which the sovereignty of the coastal State extends (i.e. internal waters, the territorial sea and archipelagic waters)¹ as well as beyond: in the contiguous zone; in a State's exclusive economic zone (EEZ); and on the high seas, including in areas above the continental shelf.² A full account of the applicability of IHRL to MSOs therefore requires an understanding of which of these areas are considered to be within a State's territory, and which are not, as well as analysis of how and when the criteria determining applicability, either territorially or extraterritorially, are met in the context of MSOs. To address these questions, this and the following chapter consider, in turn, the territorial and extraterritorial applicability of the IHRL treaties under consideration to MSOs.

As this chapter explains, the applicability of IHRL treaties, in general, within the territory of States parties is uncontroversial. Furthermore, the whole of a treaty

¹ Art 2(1) of the United Nations Convention on the Law of the Sea states that, 'The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.' Under art 3, '[e]very State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.' Internal waters are defined as those landward of the same baselines (art 7) and archipelagic waters are those within archipelagic baselines established according to art 47. United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS).

² The high seas are defined as 'all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.' *ibid* art 86. For discussion of the contiguous zone, EEZ and continental shelf, see below s 3.3.3.

will usually apply at all times and throughout the territory in question.³ However, there is a surprising paucity of analysis as to how—indeed whether—this translates to the territorial sea, as well as internal and archipelagic waters. Although some writers state that human rights treaties apply throughout these areas,⁴ a detailed explanation for this conclusion is generally lacking. Furthermore, as will be discussed in this section, while the practice of courts and treaty bodies does not contradict this position, the issue has not been considered directly and in detail.

This chapter begins by considering the territorial application of IHRL treaties in general. It begins with the observation that treaties are presumed to apply throughout the entire territory of each State party, but that presumption can be displaced either explicitly or implicitly by the terms of the treaty in question. Most, but not all, of the IHRL treaties under consideration contain express terms defining the spatial scope of their applicability. While applicability is, for most such treaties, predicated on the existence of a State party's jurisdiction over the individual whose rights are in issue, such jurisdiction is normally exercised throughout the State's territory. Even where a State is prevented from exercising its jurisdiction within its territory by *de facto* obstacles, such as the presence of an occupying force or a conflicting rule of the law of State immunity, there is practice to suggest that IHRL treaties continue to apply, although the State's required conduct is modified by those circumstances. Consequently, the presumption of territorial applicability is not normally displaced, even in cases where applicability depends on a jurisdictional link.

Having established the territorial applicability, in general, of the IHRL treaties under consideration, the section proceeds to consider how this applies to the maritime domain. It is first explained that a State's territory is generally understood to include any internal or archipelagic waters, as well as the territorial sea. However, it is nevertheless noted that the applicability of the

³ This is in contrast to the extraterritorial applicability of IHRL treaties, at least so far as it depends on the exercise of authority and control over individuals, in which case obligations may be 'divided and tailored' to the circumstances. See below s 3.3.2.

⁴ See, for example, John E Noyes, 'The Territorial Sea and Contiguous Zone' in Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 104.

IHRL treaties under consideration in these areas has not been the subject of detailed analysis by courts or treaty bodies. The section therefore proceeds to consider whether there are any special features of a State's maritime territory such as might displace the presumption of the applicability throughout them. Having considered various rules of the law of the sea that can limit the exercise of a coastal State's jurisdiction in its maritime territory, it is argued, drawing upon analogous practice in other contexts, that each of the IHRL treaties under consideration is likely to apply throughout a State's maritime territory, although the obligations they entail may, in some circumstances, be modified by conflicting law of the sea rules.

2.2. The territorial application of human rights treaties generally

The 1969 Vienna Convention on the Law of Treaties (VCLT) provides a starting point for understanding treaties' spatial scope of application. According to Article 29, 'Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.'⁵ The law of treaties therefore provides two rebuttable presumptions: first, a treaty extends at least to the territory of each State party; and, second, where a treaty applies to the territory of a State party, it will apply to its *entire* territory. Nevertheless, it is clear from Article 29 VCLT that these presumptions can be rebutted, either expressly or by implication. It follows, therefore, that for each treaty under consideration, it must be considered whether these presumptions are, indeed, displaced.

Human rights treaties usually contain clauses intended to define their scope of application. For the International Covenant on Civil and Political Rights (ICCPR),⁶ European Convention on Human Rights (ECHR)⁷ and American Convention on Human Rights (ACHR).⁸ a single clause governs the application

⁵ Vienna Convention on the Law of Treaties (concluded 23 May 1969, entered into force 27 January 1980) 1155 UNTS 332 (1969 Vienna Convention) art 29.

⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 2(1).

⁷ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 1.

⁸ American Convention on Human Rights: 'Pact of San José, Costa Rica' (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 144 (ACHR) art 1(1).

of the instrument as a whole. The Convention Against Torture (CAT),⁹ meanwhile, adopts a different approach, whereby individual provisions are subject to various, differing, application clauses. Other treaties, including the African Charter on Human and Peoples' Rights (ACHPR),¹⁰ contain no provision setting out in express terms their scope of application, and therefore nothing on their face to displace the application of Article 29 VCLT. The following paragraphs consider the consequences of these different approaches.

The ECHR and ACHR are very similar in this regard. Article 1 ECHR states that, 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in...this Convention.' Its applicability depends, therefore, on what it means to be within the 'jurisdiction' of a State party. As discussed below in connection with the extraterritorial applicability of human rights treaties, jurisdiction in this context is not limited to the meaning ascribed to the term in general international law.¹¹ Nevertheless, the European Court of Human Rights (ECtHR) *has* relied on classical conceptions of jurisdiction in identifying a baseline territorial scope of application. For example, in *Banković*, the Grand Chamber interpreted the term according to its ordinary meaning, leading to the conclusion that 'the jurisdictional competence of a State is primarily territorial.'¹² Consequently, it found 'that Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction'.¹³ While the ECtHR has latterly taken a broader approach to the extraterritorial application of the ECHR than that taken in *Banković*,¹⁴ it has consistently maintained that, 'A State's jurisdictional competence under Article 1 is primarily territorial' and that, 'Jurisdiction is presumed to be exercised normally throughout the State's territory'.¹⁵

⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 113 (CAT)

¹⁰ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58.

¹¹ See below s 3.2.2.

¹² *Banković and Others v Belgium and Others* ECHR 2001–XII 333 [59].

¹³ *Ibid* [61].

¹⁴ See below s 3.2.2.

¹⁵ *Al-Skeini and Others v the United Kingdom* ECHR 2011 [131].

Notwithstanding its general applicability throughout the entirety of a State's territory, the ECHR contains a specific exception to this rule that is unique amongst the instruments under consideration.¹⁶ This is the 'colonial clause' contained in Article 56, according to which a State party may elect whether or not to extend the Convention to 'all or any of the territories for whose international relations it is responsible.'¹⁷ This provision serves a specific purpose in allowing States to disapply the Convention with respect to particular overseas territories or federated States.¹⁸ The language of Article 56 clearly refers to territories, as in distinct entities, rather than to territory in general; hence, it does not permit a State to disapply the ECHR within an arbitrarily defined area. Where a declaration under Article 56 is made, the result will be that the ECHR will no longer apply to the 'entire territory' of the State party and, in that very limited sense only, such a declaration rebuts the contrary presumption contained in Article 27 VCLT. However, it does not affect the application of the ECHR throughout the entirety of the remaining territory.

Turning to the ACHR, Article 1(1) states that, 'The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms'. This text is essentially the same as Article 1 ECHR. Therefore, as for the ECHR, the applicability of the ACHR turns on what it means to be within a State's jurisdiction. The practice of the Inter-American Commission on Human Rights in interpreting the meaning of 'jurisdiction' in this particular respect has broadly mirrored that of the ECtHR, requiring each State party to the ACHR 'to respect the rights of all persons within its territory' as well as, in some circumstances, extraterritorially.¹⁹ In contrast to the ECHR, however, the absence of a 'colonial clause' in the ACHR denies States parties the option to foreclose the ACHR's application throughout their overseas territories.

¹⁶ Though common in other European human rights instruments. Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 14–15.

¹⁷ ECHR (n 7) art 56(1).

¹⁸ Milanovic (n 16) 13–14.

¹⁹ *Franklin Guillermo Aisalla Molina v Ecuador*, Case IP-02, Report No 112/10, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.140 Doc 10 (2010) [91].

In contrast to the ECHR and ACHR, the spatial scope of application of the ICCPR is defined with reference to ‘territory’, as well as ‘jurisdiction’. The relevant provision is Article 2(1), which states that:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The meaning of the phrase that controls the application of the ICCPR, ‘within its territory and subject to its jurisdiction’, has been, and remains, controversial.²⁰ The debate, which has arisen in connection with the extraterritorial applicability of the ICCPR, can be reduced to the question whether the two requirements—of being within a State’s territory, and of being subject to its jurisdiction—are to be construed disjunctively or conjunctively. This debate is of pivotal importance to the extraterritorial applicability of the ICCPR, and is therefore discussed in that context in detail in Chapter Three.²¹ However, it is largely incidental to the question of the ICCPR’s *territorial* applicability.

If a disjunctive construction is preferred, such that the ICCPR applies both to individuals within a State’s territory, as well as to those subject to its jurisdiction, then the treaty must apply *at least* to the territory of each State party. If, on the other hand, Article 2(1) is read conjunctively to restrict the ICCPR’s application to those individuals who are *both* within a State’s territory *as well as* being subject to its jurisdiction, the ICCPR’s applicability within a State’s territory is limited to individuals within that State’s jurisdiction. However, the same analysis would apply to the meaning of the term ‘jurisdiction’ in this context as it does to that term’s meaning in the ECHR and ACHR. If, consistent with the practice of the European and American systems, a State’s jurisdiction is considered normally to be exercised throughout its territory, it follows that the reference to jurisdiction does nothing to further limit the ICCPR’s territorial applicability.

The CAT adopts yet another approach, whereby individual provisions contain clauses limiting or defining their scope of application. Not all of these are the

²⁰ See, for example, Karen da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Martinus Nijhoff 2013) 1–14.

²¹ See below s 3.2.1.2.

same in form or effect, particularly with respect to potential extraterritorial applicability, which, as discussed in Chapter Three,²² is subject to continued debate. However, in relation to territorial applicability, the situation is more straightforward. Where an individual alleged to have committed an offence of torture is located in its territory, a State Party must either 'establish its jurisdiction over' the alleged offence or extradite the suspect.²³ The obligation to 'take such measures as are necessary to establish its jurisdiction' over offences of torture also applies 'in any territory under [a State party's] jurisdiction'.²⁴ Similarly, most of the other duties and obligations under CAT are owed by a State party only 'in any territory under its jurisdiction'.²⁵ This is the case with respect to the key obligations for a State Party to prevent, under article 2(1), torture and, under article 16(1), other acts of cruel, inhuman or degrading treatment or punishment. While the application of certain provisions only to territory under the jurisdiction of a State leaves open the possibility that a State may exercise jurisdiction over territory other than its own, it is uncontroversial that the territory under the jurisdiction of a State normally includes, at least, that State's *own* territory.

Turning, finally, to the ACHPR, there is, as noted above, nothing on its face to displace the presumptions contained in Article 29 VCLT. Furthermore, there is nothing from which a limitation to its territorial applicability can plausibly be inferred. Therefore, although the issue has not been addressed directly by the African Commission or African Court, it is a safe assumption that the ACHPR normally applies throughout the territories of States parties.²⁶

Each of the instruments under consideration usually applies, therefore, throughout a State's territory, although the precise basis for this conclusion varies between instruments. In the case of the ECHR, the existence of the colonial clause provides a clear exception to this rule. More broadly, however,

²² See below s 3.2.1.4.

²³ CAT (n 9) art 5(2).

²⁴ *ibid* art 5(1). The formulation 'any territory under its jurisdiction' also allows for extraterritorial applicability under certain circumstances. See below s 3.2.1.1.

²⁵ CAT (n 9) arts 2(1), 11–13, 16.

²⁶ This appears to be the assumption made in the literature. See, for example, Frans Viljoen, 'Communications under the African Charter: Procedure and Admissibility' in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights* (2nd edn, CUP 2008) 107.

the question arises whether there are circumstances in which these instruments cease to apply territorially. The dependence on, or at least reference to, the exercise of jurisdiction, in the ECHR, ACHR, ICCPR and CAT, begs the question whether there are circumstances in which a State no longer exercises jurisdiction such that the instrument in question would no longer apply. This might be argued to be the case where a State, as a matter of fact, is no longer able to exercise effective control over part of its territory, a possibility considered by the ECtHR in *Loizidou v Turkey*, which concerned Turkey's occupation of northern Cyprus.²⁷ The Court acknowledged that Turkey was exercising effective control over the region, rather than the government of the Republic of Cyprus; as a result, the Turkish authorities were responsible not just for the acts of its own occupying forces, but also for those of the local administration.²⁸

However, even where the ECtHR has recognised the *de facto* inability of the territorial State fully to discharge its obligations under the ECHR, it has still required from it those measures that were within its power to take.²⁹ In relation to the loss of effective control by Moldova over an area established by separatists as the Moldovan Republic of Transdniestra, the ECtHR held:

...that where a Contracting State is prevented from exercising its authority over the whole of its territory by a constraining *de facto* situation, such as obtains when a separatist regime is set up, whether or not this is accompanied by military occupation by another State, it does not thereby cease to have jurisdiction within the meaning of Article 1 of the Convention over that part of its territory temporarily subject to a local authority sustained by rebel forces or by another State.

Nevertheless, such a factual situation reduces the scope of that jurisdiction in that the undertaking given by the State under Article 1 must be considered by the Court only in the light of the Contracting State's positive obligations towards persons within its territory. The State in question must endeavour, with all the legal and diplomatic means available to it *vis-à-vis* foreign States and international organisations, to

²⁷ *Loizidou v Turkey* (Preliminary Objections) Series A no 310 (ECtHR).

²⁸ *ibid* [59]–[64]; *Cyprus v Turkey* ECHR 2001-IV 1 [76]–[81].

²⁹ Da Costa (n 20) 169–70. See also Kjetil Mujezinović Larsen, “Territorial Non-Application” of the European Convention on Human Rights’ (2009) 78 *Nordic J of Intl L* 73, 85–87. Larsen notes that this possibility was not considered in the cases concerning the Turkish occupation of Cyprus, in which the complaint was made only against Turkey.

continue to guarantee the enjoyment of the rights and freedoms defined in the Convention.³⁰

The passage above makes clear that the inability to exercise authority over territory does not mean that the ECHR ceases to apply; instead, the State's obligations are modified in the light of practical difficulties in meeting them. In the same and similar situations, including the situation in Transdniestria, the Human Rights Committee (HRC) has likewise considered the ICCPR to apply, but, recognizing the difficulty States have faced in meeting their obligations, has required them only to do what they can within the scope of their effective power.³¹ However, it is important to distinguish a situation where a State is *prevented* from exercising effective control over part of its territory as a result of occupation or insurrection from situations where a State chooses not to do so. There is no suggestion that the State's choice not to govern a region of its territory, or its inability to do so due to insufficiency of resources, effectively relieves it of its obligations.

Notably, the ECtHR has taken an analogous approach in situations where a State is prevented from fulfilling its obligations under the ECHR because of a conflicting obligation to respect the immunity of individuals or premises.³² In such circumstances, it is clear that the ECHR still applies, although the conduct required of the State by virtue of its obligations under the Convention is modified in light of the relevant rules of immunity, which are applied as

³⁰ *Ilasçu and Others v Moldova and Russia* ECHR 2004-VII 179 [333].

³¹ UN Human Rights Committee, 'Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Republic of Moldova' (4 November 2009) UN Doc CCPR/C/MDA/CO/2 para 5 ('The Committee takes note of the State party's information that its inability to exercise effective control over the territory of Transdniestria continues to impede the implementation of the Covenant in that region. It notes, however, the State party's continuing obligation to ensure respect for the rights recognised in the Covenant in relation to the population of Transdniestria within the limits of its effective power.') For discussion and other examples of the HRC's practice, see Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (3rd edn, OUP 2013) 100–01.

³² On the law of diplomatic immunity from enforcement, see, for example, Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, OUP 2015) 597–98.

restrictions or limitations to the rights in question.³³ Reviewing its own practice in *Jones and Others v the United Kingdom*, the Court concluded that recognition of immunity could amount to a lawful limitation on a right otherwise to be enjoyed, recognising that, 'The grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty'.³⁴ In deciding whether the pursuit of such a legitimate aim amounted to a proportionate limitation on a right otherwise to be enjoyed, the Court said that 'the need to interpret the Convention so far as possible in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity, has led to the Court to conclude that measures taken by a State which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in [the right to a fair trial]'.³⁵

The ECtHR's position with respect to State immunity, along with both its, and the HRC's, approaches to the loss of effective control over an area, disclose a tendency to avoid the conclusion that a human rights treaty entirely ceases to apply in an area or situation where a State is prevented from exercising aspects of its jurisdiction. Furthermore, although the jurisprudence set out above is authoritative only within each respective human rights system, the same reasoning could be applied to the other instruments under consideration. Indeed, the suggestion that human rights treaties *do* cease entirely to apply in such circumstances would arguably run counter to the object and purpose of human rights treaties generally. Consequently, while the ability of a State to exercise its jurisdiction throughout its territory may be limited in its ability to assert its authority, this does not necessarily mean that the instrument will cease to apply, but rather that the content of the relevant obligations may be modified or attenuated in light of the prevailing circumstances.

³³ See further William A Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 100.

³⁴ *Jones and Others v the United Kingdom* ECHR 2014 [188].

³⁵ *ibid* [189].

2.3. The territorial application of human rights treaties in the maritime domain

Having considered the territorial application, generally, of the human rights treaties under consideration, the next step is to understand how this applies in the maritime environment and, consequently, to the conduct of MSOs. Two questions are key to this. First, recalling the conclusion reached above that human rights treaties normally apply through the entire territory of each State party, which, if any, maritime areas are included within a State's territory? Second, are there any features of the maritime areas within a State's territory that might rebut the presumption that human rights treaties apply within them?

Turning to the first of these questions, according to Article 2(1) UNCLOS, 'The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.' The Territorial Sea Convention likewise contains an equivalent provision, albeit omitting reference to archipelagic waters.³⁶ Sovereignty in this context is generally understood to mean territorial sovereignty, by which it is meant that the sovereignty of a State over its internal waters, archipelagic waters and territorial sea arises from the inclusion of those maritime zones in the State's territory.³⁷ Thus, in its commentary to the draft of what became Article 29 VCLT, the International Law Commission (ILC) states that the entire territory of a State includes 'all the land and appurtenant territorial waters and air space which constitute the territory of the State'.³⁸ This can be contrasted with the situation in the contiguous zone,

³⁶ Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 29 April 1958) 516 UNTS 206 art 1(1).

³⁷ See, for example, James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 203; Malcolm N Shaw, *International Law* (7th edn, CUP 2014) 352; Lindy S Johnson, *Coastal State Regulation of International Shipping* (Oceana Publications 2004) 489–92. Guilfoyle questions this argument, noting that, 'While sovereignty certainly follows from a state's possession of territory, the exercise of sovereignty or sovereign rights over a space or object does not make it territory.' Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (CUP 2009) 226. While this statement is undoubtedly correct in itself, the weight of opinion suggests that, in the case of internal waters, archipelagic waters and the territorial sea, sovereignty does, indeed, reflect their status as territory.

³⁸ International Law Commission, 'Draft Articles on the Law of Treaties with Commentaries' [1966] 2 United Nations YB of the Intl L Commission 187 (Draft

exclusive economic zone and the waters seaward of territorial waters that lie over the continental shelf ; these are all areas in which areas the coastal State enjoys only certain limited sovereign rights and are not part of its territory.³⁹ Therefore, with respect to the presumption that treaties apply to the entire territory of a State, the area in question includes a State's internal waters, territorial sea and archipelagic waters, but not any of the other maritime zones seaward of the territorial sea.⁴⁰

The second question is less straightforward, not least because the applicability of human rights instruments in a State's internal waters, archipelagic waters and territorial sea has not been the subject of detailed consideration by courts or treaty bodies. Nevertheless, limited practice in the ECtHR is arguably consistent with the proposition that human rights treaties apply in the territorial sea and, *a fortiori*, in internal and archipelagic waters. In *Women on Waves and Others v Portugal*, a Portuguese warship blocked a chartered ship from entering the Portuguese territorial sea in order to prevent the ship being used as a base for the promotion of reproductive rights.⁴¹ Although without addressing the question directly, the ECtHR proceeded on the basis that the ECHR was applicable in the circumstances, as evidenced by its conclusion that Portugal's actions amounted to a violation of the protestors' freedom of expression, protected under article 10 of the ECHR. Similarly, in *Islamic Republic of Iran Shipping Lines v Turkey*,⁴² the ECtHR found that there had been a breach of the right to peaceful enjoyment of property, protected under Article 1 of Protocol 1 to the

Articles on the Law of Treaties with Commentaries), 213. While 'territorial waters' is not a term recognised in the law of the sea, it can most plausibly be understood as including both a State's internal waters (including any archipelagic waters) and its territorial sea. Syméon Karagiannis, 'Article 29 Convention of 1969' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP 2011) 752.

³⁹ Karagiannis (n 38) 753–54. See also Crawford (n 37) 205.

⁴⁰ Noyes (n 4) 104; Anthony Aust, *Modern Treaty Law and Practice* (3rd edn, CUP 2013) 178 (though noting that Aust does not refer explicitly to archipelagic waters).

⁴¹ *Women on Waves and Others v Portugal* App No 31276/05 (ECtHR, 3 February 2009).

⁴² *Islamic Republic of Iran Shipping Lines v Turkey* ECHR 2007-V 327.

ECHR,⁴³ in relation to the seizure of a vessel by the Turkish authorities in Turkish territorial waters.

Unfortunately, in neither *Women on Waves and Others v Portugal* nor *Islamic Republic of Iran Shipping Lines v Turkey* did the ECtHR make clear the basis on which it considered the ECHR as applying *ratione loci*. Indeed, in neither case does it appear to have been in issue. Furthermore, as will be discussed below in connection with extraterritorial application, there are alternative bases on which it could have applied, namely the authority and control being exercised by the ships in question in each case.⁴⁴ Therefore, while there is nothing in either case to suggest that the ECHR *does not* apply throughout the territorial sea, the paucity of practice concerning the territorial applicability of human rights instruments to the territorial sea (or internal and archipelagic waters) and the absence of any detailed examination of the question at all, leaves the issue open to further analysis.

It is therefore necessary to consider any features unique to a State's maritime territory, as distinct from its land territory, that might arguably limit the jurisdiction of a State, such that the territorial applicability of some or all human rights treaties, particularly those that make explicit reference to their applicability to those only within their jurisdiction, might be called into question. Potential such limitations to territorial jurisdiction over the territorial sea and internal or archipelagic waters might be found in the coastal State's obligation to respect the rights of innocent passage, transit passage and archipelagic sea lanes passage. Considering the first of these, ships of all States enjoy a right to continuous and expeditious passage through the territorial sea and archipelagic waters of any coastal State.⁴⁵ A right of innocent passage also exists in those internal waters that are created by drawing straight baselines in accordance with Article 7 UNCLOS.⁴⁶ So long as a ship's passage is innocent, meaning that

⁴³ Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 20 March 1952, entered into force 18 May 1954) ETS 9 (ECHR Protocol 1) art 1. Rights protected under the Protocol are subject to the same applicability provisions as those contained in the ECHR itself. *ibid* art 5.

⁴⁴ See below s 3.3.4.

⁴⁵ UNCLOS (n 1) arts 17, 52.

⁴⁶ *ibid* 8(2). The provision in question refers to 'a right of innocent passage as provided in this Convention' existing in such circumstances. However, whereas

'it is not prejudicial to the peace, good order or security of the coastal State' and is conducted 'in conformity with [UNCLOS] and other rules of international law',⁴⁷ the jurisdiction of the coastal State is modified with respect to the ship in a number of ways.

Most importantly, the coastal State may not hamper the innocent passage of a Ship, except as provided for by UNCLOS.⁴⁸ In particular, while the coastal State generally enjoys legislative jurisdiction,⁴⁹ its enforcement jurisdiction is limited.⁵⁰ Although it may exercise its criminal jurisdiction on board a foreign ship passing through its territorial sea after having left its internal waters,⁵¹ it may not do so in relation to a crime that has been committed before a ship enters its territorial sea and where the ship does not enter internal waters.⁵² Where a crime is committed on board a ship *while it is passing through* the territorial sea (without entering internal waters), a coastal State '*should not*' exercise its criminal jurisdiction except in particular, enumerated, circumstances.⁵³ This latter

art 52 specifies that the whole of the innocent passage regime set out in s 3 applies *mutatis mutandis* to archipelagic waters, art 8(2) is not so explicit in relation to the special category of internal waters. It is nevertheless submitted that the right of innocent passage 'provided in this Convention' must refer to the entirety of s 3.

⁴⁷ *ibid* art 19(1). Art 19(2) further enumerates a range of activities that would be considered to be prejudicial to the peace, good order or security of the coastal State. According to art 18, passage refers to the continuous and expeditious navigation of the maritime zone in question. *ibid* art 18.

⁴⁸ *ibid* art 24(1).

⁴⁹ UNCLOS sets out the scope of legislative jurisdiction of a coastal State with respect to innocent passage itself. *ibid* arts 21, 26. It also provides that legislation should be non-discriminatory and should not 'have the practical effect of denying or impairing the right of innocent passage'. *ibid* art 24(1). Beyond this, it can be inferred from the sovereignty of the coastal State over the waters in question that, as a matter of law, it enjoys general legislative jurisdiction. R R Churchill and A V Lowe, *The Law of the Sea* (Manchester UP 1999) 95.

⁵⁰ UNCLOS (n 1) arts 27–28.

⁵¹ *ibid* art 27(2).

⁵² *ibid* art 27(5).

⁵³ *ibid* art 27(1) (emphasis added). These circumstances are:

- (a) if the consequences of the crime extend to the coastal State;
- (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
- (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or

provision, however, is generally considered to be a matter of comity rather than law.⁵⁴

In the exercise of civil jurisdiction, a coastal State 'may not levy execution against or arrest [a] ship' passing through its territorial sea, without having entered its internal waters, except 'in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State.'⁵⁵ In addition, it should not, again as a matter of comity, 'stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship.'⁵⁶

In addition to the innocent passage regime, a right of transit passage exists in 'straits used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.'⁵⁷ The provisions comprising the transit passage regime also apply *mutatis mutandis* to archipelagic sea lanes passage,⁵⁸ which applies in specific routes through archipelagic waters and the adjacent territorial sea,⁵⁹ such routes being either designated by the archipelagic State, or following normal routes of international navigation.⁶⁰

Ships in transit passage or archipelagic sea lanes passage must proceed without delay and must refrain both from the threat or use of force against the

(d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

⁵⁴ Churchill and Lowe (n 49) 98, Noyes (n 4) 100–01, Lindy S Johnson, *Coastal State Regulation of International Shipping* (Oceana Publications 2004) 82 fn 283. Art 27 UNCLOS essentially replicates art 19 of the Convention on the Territorial Sea and the Contiguous Zone, on the drafting of which see Gerald Fitzmaurice, 'Some Results of the Geneva Conference on the Law of the Sea' (1959) 8 Intl & Comparative L Q 73, 104.

⁵⁵ UNCLOS (n 1) arts 28(2), 28(3).

⁵⁶ *ibid* art 28(1). The same considerations arise with respect to the meaning of the language used in art 28 as arise with respect to art 27, specifically the hortatory nature of the words 'should not'. As for art 27, art 28 essentially replicates its equivalent provision in the Territorial Sea Convention, art 20, on the drafting of which see Fitzmaurice (n 54) 107.

⁵⁷ UNCLOS (n 1) art 37.

⁵⁸ *ibid* art 54.

⁵⁹ *ibid* art 53(1).

⁶⁰ *ibid* art 53(12).

coastal State, as well from activities that are not 'incident to their normal modes of continuous and expeditious transit.'⁶¹ A vessel in breach of the transit passage or archipelagic sea lanes passage regimes loses the associated protection from coastal State jurisdiction.⁶² However, so long as a ship complies with these requirements, the right of the coastal State to exercise jurisdiction is limited only to specific matters enumerated in Article 42:

- (a) the safety of navigation and the regulation of maritime traffic . . .
- (b) the prevention, reduction and control of pollution . . .
- (c) with respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear;
- (d) the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of States bordering straits.⁶³

The transit passage regime does not contain additional provisions, equivalent to those relating to innocent passage, that deal with the exercise of criminal and civil jurisdiction. It is therefore understood that Article 42 sets out in its entirety the scope of the coastal State's authority with respect to a vessel in transit or archipelagic sea lanes passage. As a result, 'coastal State jurisdiction over ships in transit [and archipelagic sea lanes] passage is considerably narrower than is jurisdiction over ships in innocent passage'.⁶⁴ Furthermore, while innocent passage can, in most circumstances, be temporarily suspended, no such right exists with respect to transit or archipelagic sea lanes passage.⁶⁵

From this brief survey, it is clear that the innocent, transit and archipelagic sea lanes passage regimes interfere with the exercise of jurisdiction by the coastal State over vessels conforming to each respective regime. The extent to which this is the case differs between them; coastal State jurisdiction is affected less by the innocent passage regime than the transit passage and archipelagic sea lanes passage regimes. Nevertheless, these limitations on coastal State

⁶¹ *ibid* art 29(1).

⁶² Churchill and Lowe (n 49) 107. Such activities would almost certainly be in breach of the requirements of innocent passage too.

⁶³ UNCLOS (n 1) art 42.

⁶⁴ Churchill and Lowe (n 49) 108.

⁶⁵ UNCLOS (n 1) art 44.

jurisdiction over its territorial sea, and internal and archipelagic waters, raise the question whether they affect the territorial applicability of human rights instruments that depend on the existence of jurisdiction over a particular area.

This situation can be compared to the other circumstances, discussed above, where States' jurisdiction, or their ability to enforce it, is limited by a State's loss of effective control over a part of its territory or where its enforcement jurisdiction is limited by a rule of State immunity, and most closely to the latter. As in that case, the passage regimes impose restrictions on enforcement jurisdiction with respect to specific individuals or entities (ships, in the case of the passage regimes), without affecting any other aspects of a State's jurisdiction over the area in question. This is in contrast to the loss of effective control over an area, where the factual situation interferes with the State's ability to enforce its jurisdiction over the area as a whole.

In both cases, however, the practice of the ECtHR and, with respect to loss of effective control over territory, the HRC too, indicates that the relevant human rights treaties continue to apply, but that a State's concrete obligations may be modified in light of the particular circumstances. As noted above, while other Courts and treaty bodies are not formally bound by this approach, it is likely to be highly persuasive. By analogy, therefore, it seems unlikely that the limitations placed upon a State's ability to enforce its jurisdiction under the passage regimes would lead to a human rights treaty being judged by them not to apply at all in a State's maritime territory. Instead, tracking the ECtHR's treatment of the State immunity issue, it is likely that the law of the sea's prohibition of any action that would normally be required of a State pursuant to its human rights treaty obligations, would be evaluated under the framework of limitations or restrictions to the right in questions. While, under this approach, it would not be inevitable that such limitation or restriction imposed by the law of the sea would necessarily be considered lawful, this is no different from the situation as it pertains to State immunity.

2.4. Conclusion

Notwithstanding the paucity of practice on the specific point, the analysis set out above supports the conclusion that the territorial applicability of the human

rights treaties under consideration, whether or not contingent on the existence of jurisdiction, extends throughout States' territorial seas, and internal and archipelagic waters. This follows from the application of the presumption, confirmed through practice, that human rights treaties generally apply throughout a State's territory, which includes those particular maritime zones. While a State's ability to enforce its jurisdiction may be limited by particular rules of the law of the sea, it seems unlikely that this would displace the presumption of applicability.

Application of human rights treaties on a territorial basis generally implies the application of the full range of rights contained within each treaty, although obligations under the law of the sea may act as limitations or restrictions to particular rules. Considering the relevance of these conclusions specifically to the conduct of MSOs, a State's human rights treaty obligations are likely apply to operations conducted throughout its maritime territory. In contrast to many situations, discussed below, in which human rights treaties apply extraterritorially, the application of human rights treaties to MSOs in a State's maritime territory does not depend on particular action taken by a State's agents. As a result, a State's human rights treaty obligations are likely to apply at all stages of an MSO conducted in its territorial sea, or internal and archipelagic waters.

3. The Applicability of International Human Rights Law to Maritime Security Operations Conducted Outside a State's Territory

3.1. Introduction

Maritime Security Operations (MSOs) may be conducted throughout the maritime domain, including in areas beyond a State's maritime territory. However, the extraterritorial application of international human rights law (IHRL) treaties, has been a subject of considerable controversy.¹ As will be explained, IHRL treaties usually apply with respect to an individual who is within the jurisdiction of a State; however, the term 'jurisdiction' in this context is understood to be broader than its usual meaning in international law. Furthermore, the situation differs between treaties, with both the relevant provisions and subsequent practice differing and diverging in some important respects. While it is generally, though not universally, accepted that each of the treaties under consideration is capable of extraterritorial application, the circumstances in which this will be the case may differ.

Translating the extraterritorial applicability of IHRL treaties, in general, to the maritime domain, adds a further layer of complexity. Nevertheless, the handful of reported cases that have dealt directly with the extraterritorial application of IHRL treaties in the maritime environment, including on the high seas, indicate that they are capable of being applied in a range of such situations.² Indeed, noting that the broad applicability of IHRL to MSOs is a key premise underlying this thesis, the following statement of the European Court of Human Rights (ECtHR) reflects the principles underlying the approach it is submitted ought to be taken:

the special nature of the maritime environment relied upon by the Government in the instant case cannot justify an area outside the law where ships' crews are covered by no legal system capable of affording

¹ See, for example, Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 1–2; Karen da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Martinus Nijhoff 2013) 1–4. In some circumstances the matter is more settled. For example, the scope of application of a State's IHRL obligations is generally accepted as extending extraterritorially to vessels bearing its flag. See below s 3.3.2.

² See, in particular, *Medvedyev and Others v France* ECHR 2010; *Hirsi Jamaa and Others v Italy* ECHR 2012.

them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction, any more than it can provide offenders with a “safe haven”.³

However, the depth and detail of this jurisprudence is arguably insufficient either to draw clear conclusions or to plot all of the relevant legal contours and limits. Instead, a comprehensive understanding requires not only an examination of the limited maritime practice, but also consideration of the general principles established by the wider jurisprudence on extraterritorial application, and how these translate to the maritime environment.

This chapter is divided into two sections: the law, principles and practice concerning the extraterritorial application of IHRL treaties in general; and the application of this to the conduct of MSOs in particular. The first subsection begins with the observation that the law of treaties contains no presumption for or against the extraterritorial application of treaties in question. Considering, therefore, the terms of the IHRL treaties in question, it is explained that each contains slightly different provision with respect to its applicability. Of note, under the Convention Against Torture (CAT),⁴ different obligations are made subject to different provisions for their applicability, some of which are very narrow or specific in their scope. However, with respect to the other IHRL treaties under consideration, it is explained that they are all capable of extraterritorial application, and that this depends, or can be persuasively argued to depend, on the question whether the individual whose rights are in question is within the ‘jurisdiction’ of the State concerned.

The term ‘jurisdiction’ has been interpreted differently between the different treaties under consideration, although it has consistently been understood more broadly than according to its usual meaning under international law. Although familiar situations of extraterritorial *de jure* jurisdiction have, in some instances, been recognised as sufficient, the extraterritorial applicability of the IHRL treaties under consideration more typically depends on the *de facto* exercise of power: either the effective control over an area, or the exercise by State agents

³ *Medvedyev* (n 2) [81]. The ECtHR subsequently referred to this passage, seemingly with approval, in *Hirsi Jamaa* (n 2) [178].

⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 113 (CAT).

of authority and control over an individual.⁵ However, beyond these broad principles, the practice relating to the different treaties under consideration diverges in some important respects.

The practice of the ECtHR and Inter-American Commission on Human Rights (IACHR) in applying the European Convention on Human Rights (ECHR)⁶ and American Convention on Human Rights (ACHR),⁷ respectively, is informative both as to how IHRL treaties, in general, can be applied extraterritorially, as well as to the differences of approach that can arise. Surveying each in turn, it is explained that the ECtHR's jurisprudence is particularly complex; although it has been clarified in recent years by a restatement of the law in *Al-Skeini*,⁸ significant issues remain. Most notably, while the ECtHR has now recognised that extraterritorial application can arise through State agent authority and control, in addition to effective control over an area, this arguably does not apply to the use, by State agents, of extraterritorial force (and possibly other 'instantaneous acts') without an additional contextual element, such as the exercise of 'public powers' by the State agents in question. On the other hand, the IACHR has generally not relied on effective control over an area, but has instead applied the ACHR more liberally on the basis of State agent authority and control. Indeed, it has done so specifically on the basis of the use of force by State agents both in another State's territory and in international airspace.

The second section proceeds to apply these principles to the conduct of extraterritorial MSOs. It begins by considering the special situation in which a State conducts an MSO involving a vessel flying that State's own flag. This well-established example of *de jure* jurisdiction is referred to as an express basis for the application of some provisions of the CAT and has been cited and used as

⁵ State agents mean those whose actions, which amount to the exercise of authority and control are attributable to the State. The question of attribution in this regard is not usually an issue where MSOs are conducted by a State's armed forces or other government agencies. However, for discussion of the relevant law in the circumstances in which attribution is in doubt, see below s 6.3.1.

⁶ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

⁷ American Convention on Human Rights: 'Pact of San José, Costa Rica' (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 144 (ACHR).

⁸ *Al-Skeini and Others v the United Kingdom* ECHR 2011 (*Al-Skeini*, ECtHR).

the basis for the extraterritorial application of the ECHR. Next, the section considers whether there are situations in which IHRL treaties may apply to an extraterritorial MSO through effective control of an area; although well-established in the land context, particularly with respect to the ECHR, it is explained that the principles do not transfer easily to the maritime. While some such circumstances can tentatively be suggested, it is unlikely to be a significant basis for the extraterritorial application of IHRL treaties to MSOs in practice.

Finally, the section considers the extraterritorial application of IHRL treaties to MSOs through State agent authority and control. As is explained, applicability on this basis depends on the particular act undertaken by the State agent towards the individual (or individuals) concerned; and, on account of differences in the practice relating to the different treaties under consideration, the sufficiency of a particular act may differ between them. The chapter therefore breaks down MSOs to consider the different stages of activity and assess whether extraterritorial IHRL treaty obligations are likely to be engaged at each. Although the case can be made more strongly for some aspects of MSOs than others, and more strongly for some treaties than others, an argument is advanced for the engagement of a broad range of treaty obligations across most of the acts that comprise MSOs.

3.2. The law, principles and practice relating to the extraterritorial application of IHRL treaties

3.2.1. Normative framework

As discussed in Chapter Two, Article 29 of the Vienna Convention on the Law of Treaties (VCLT) contains a rebuttable presumption that treaties are 'binding on each party throughout its entire territory.'⁹ However, while important in understanding the territorial application of treaties, Article 29 does not imply any presumption either for or against the application of a treaty *beyond* a State's

⁹ Vienna Convention on the Law of Treaties (concluded 23 May 1969, entered into force 27 January 1980) 1155 UNTS 332 (1969 Vienna Convention) art 29. See above s 2.2.

territory.¹⁰ Indeed, the stated intention of the International Law Commission at the time of drafting the future Article 29 was not to deal with the question of extraterritorial application.¹¹ Instead, the main motivation behind the provision was to create a presumption in favour of including the entirety of a State's territory—especially its overseas territories as well as its 'metropolitan' territory—within the scope of application of treaties to which it is party.¹² As a result, the law of treaties provides no general answer to the question of the extraterritorial application of treaties,¹³ including those concerning human rights. Consequently, it is necessary to consider the terms of a treaty, itself, in order to understand its extraterritorial applicability.

3.2.1.1. *ECHR and ACHR*

Considering, first, those treaties that contain an express applicability provision, Article 1 ECHR applies the instrument to 'everyone within [a State party's] jurisdiction', while Article 1(1) ACHR refers, in the same context, to 'all persons subject to a State party's jurisdiction'. Therefore, as for their territorial applicability, the extraterritorial applicability of the ECHR and ACHR turns on what it means to be within (or subject to) the 'jurisdiction' of a State party. The interpretation of this term, in the context of these particular instruments and with respect to human rights treaties more generally, is discussed in detail below.

3.2.1.2. *ICCPR*

A State's obligations under the International Covenant on Civil and Political Rights (ICCPR) apply to 'to all individuals within its territory and subject to its

¹⁰ Milanovic (n 1) 10; Syméon Karagiannis, 'Article 29 Convention of 1969' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP 2011) 757.

¹¹ International Law Commission, 'Draft Articles on the Law of Treaties with Commentaries' [1966] 2 United Nations YB of the Intl L Commission 187, 213–14.

¹² Milanovic (n 1) 10. The presumption in favour of the inclusion of overseas territories within the scope of application of treaties is the reason for the inclusion of 'colonial clauses' in many instruments, including some human rights treaties, such as the ECHR (art 56). Colonial clauses reverse the presumption as to the inclusion of a State's overseas territories within the scope of application of treaties to which a State is party. On the complexities associated with such clauses, see Karagiannis (n 10) 740–45.

¹³ Milanovic (n 1) 10.

jurisdiction'.¹⁴ In contrast to the ECHR and ACHR, the applicability of the ICCPR is therefore defined with reference to 'territory', as well as 'jurisdiction'. However, the meaning of the operative phrase 'within its territory and subject to its jurisdiction' is controversial, the argument ultimately concerning the question whether it is to be construed disjunctively or conjunctively. The former interpretation reflects the position of the Human Rights Committee (HRC), according to which 'States Parties are required by Article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction.'¹⁵ Similarly, in its *Wall* Advisory Opinion, the International Court of Justice (ICJ) acknowledged the two possible interpretations,¹⁶ but concluded that 'the [ICCPR] is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.'¹⁷ This position was subsequently reaffirmed in the *Armed Activities* case, quoting the earlier decision verbatim.¹⁸

There is, therefore, strong support for the proposition that the ICCPR applies to those subject to a State's jurisdiction, even where they are outside that State's territory. However, despite the stated position of the HRC, and its affirmation twice by the ICJ, there are still States that argue for a conjunctive reading of Article 2(1) ICCPR. Most prominent among these is the United States,¹⁹ which in its combined Second and Third Reports to the HRC, stated its view that obligations under the ICCPR 'apply only within the territory of the State Party.'²⁰ It maintained this position in its Fourth Report, the most recent, although it did

¹⁴ International Covenant on Civil and Political Rights, Ratification Instrument of the United States of America (deposited 8 June 1992, with effect from 8 September 1992) 1676 UNTS 543 (ICCPR) art 2(1).

¹⁵ UN Human Rights Committee, 'General Comment No 31' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add. 13 (HRC General Comment 31), para 10.

¹⁶ *Legal Consequences of the Construction of a Wall* (Advisory Opinion) [2004] ICJ Rep 136 [108].

¹⁷ *Ibid* [111].

¹⁸ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [2005] ICJ Rep 168 [216].

¹⁹ Beth Van Schaack, 'The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change' (2014) 90 Intl L Studies 20, 53–61.

²⁰ UN Human Rights Committee, 'Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Third Periodic Reports of States Parties Due in 2003: United States of America' (28 November 2005) UN Doc CCPR/C/USA/3 (Consideration of US Third Periodic Report), 109.

state that it was ‘aware of the jurisprudence of the [ICJ]...as well as positions taken by other States Parties.’²¹ A similar view is also held by Israel, for which the issue has been of particular significance in relation to the occupied territories.²² Israel’s position, ‘in line with basic principles of treaty interpretation [is] that the Convention, which is territorially bound, does not apply, nor was it intended to apply, to areas beyond a state’s national territory.’²³

The position of the US is particularly deserving of analysis, notwithstanding the weight of institutional and judicial opinion against it, not only because of the extent of the United States’ extraterritorial military activity, including MSOs, but also due to the detail in which it has set out its argument. Its position, as articulated in its combined Second and Third Reports, is that the language of Article 2(1) is sufficiently clear—applying the ICCPR to individuals who are *both* within its territory *and* subject to its jurisdiction—not to require recourse to other tools of treaty interpretation.²⁴ However, the United States considers that if reference *were* to be made to the *travaux préparatoires* then this would also support its position.²⁵ In particular, the United States makes the point that the addition of the language ‘within its territory and’ was made at the insistence of the United States, with the clear intention that it would serve as an additional requirement over and above the requirement that a person be within a State’s jurisdiction. In particular, it asserts that the choice of the conjunction ‘and’ was

²¹ UN Human Rights Committee, ‘Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Fourth Periodic Report: United States of America’ (22 May 2012) UN Doc CCPR/C/USA/4, para 505. The extent to which the contrary view is acknowledged in some quarters within the United States is illustrated by the leaked 2004 memorandum from Harold Koh, then U.S. State Department Legal Advisor, conveying his opinion that the ICCPR has, in some circumstances, extraterritorial effect. Harold Hongju Koh, ‘Memorandum Opinion on the Geographic Scope of the Convention Against Torture’ (21 January 2013). For discussion, see Milanovic M, ‘Harold Koh’s Legal Opinions on the US Position on the Extraterritorial Application of Human Rights Treaties’ (*EJIL Talk!*, 7 March 2014) <<https://www.ejiltalk.org/harold-kohs-legal-opinions-on-the-us-position-on-the-extraterritorial-application-of-human-rights-treaties/#more-10495>> accessed 7 July 2018.

²² Van Schaack (n 19) 23 fn 9.

²³ UN Human Rights Committee, ‘Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant Pursuant to the Optional Reporting Procedure, Fourth Periodic Reports of States Parties Due in 2013: Israel’ (14 October 2013) UN Doc CCPR/C/ISR/4 para 48.

²⁴ Consideration of US Third Periodic Report (n 20) 109.

²⁵ *ibid* 109–11.

deliberate and the alternative word 'or', which would have unambiguously supported a disjunctive interpretation, was rejected during negotiations.

The position of the United States is arguably too simplistic in a number of respects.²⁶ First, it is incorrect in its assertion that the language in Article 2(1) is necessarily unambiguous. While the conjunctive construction argued for by the United States probably reflects a more natural reading, it does not do undue violence to the language to construe it disjunctively.²⁷ Indeed, were Article 2(1) to be truly unambiguous, there would have been no need for the United States to further explain its meaning, which it has done by rephrasing the provision as 'both *within* the territory of a State Party *and* subject to that State Party's sovereign authority.'²⁸

Second, the United States' position fails to reflect the requirement that terms be given their ordinary meaning 'in their context and in the light of [the treaty's] object and purpose.'²⁹ It is difficult to reconcile the object and purpose of the ICCPR, reflected in the references in its preamble to the promotion of 'universal respect for, and observance of, human rights and freedoms' and the 'inherent dignity and of the equal and inalienable rights of all members of the human family', with a reading of Article 2(1) that would permit a State party to treat individuals subject to its jurisdiction overseas in a way that would be prohibited in its own territory.³⁰ Arguably, therefore, the interpretation that accords best with the ICCPR's object and purpose is the disjunctive one. At the very least, the dissonance between a conjunctive construction and the apparent object and purpose is arguably sufficient at least to justify reference to supplementary means of interpretation, including the *travaux préparatoires*.³¹

²⁶ Da Costa (n 1) 69–72.

²⁷ Milanovic notes that the United States has elsewhere adopted a disjunctive reading of a similarly ambiguous phrase. Milanovic (n 1) 223.

²⁸ Consideration of US Third Periodic Report (n 20) 109. Of course, the United States might argue that its gloss merely emphasises the claimed meaning.

²⁹ 1969 Vienna Convention (n 9) art 31(1). This, together with the explanation provided in the remainder of art 31, is the 'general rule of interpretation'.

³⁰ Milanovic (n 1) 223. This was an argument adopted by the ICJ in its *Wall* Advisory Opinion. *Wall* (Advisory Opinion) (n 16) [109].

³¹ According to art 32 of the 1969 Vienna Convention, 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the mean

Third, the *travaux préparatoires* are, however, at best, inconclusive. Having considered the records in detail, Da Costa notes that the long and complex negotiations relating to Article 2(1) do not lend themselves to a simple conclusion.³² While it is correct that the insertion of the words ‘within its territory’ was originally intended by the United States to act as an additional requirement, over and above the exercise of jurisdiction, it seems that this was done to avoid situations where the ICCPR might create obligations that States would be unable to fulfil. In particular, the United States was concerned about situations in which States lacked legislative competence with respect to individuals over whom it might, in fact, exercise a degree of jurisdiction, for example with respect to some instances of military occupation, and where the nationals of a State are situated in the territory of another.³³ This is different from the question whether the additional words should be construed so as not to prohibit States acting abroad in a manner contrary to the ICCPR. That particular consequence does not necessarily follow and, indeed, does not appear to have been considered.³⁴

Finally,³⁵ it has been argued that the position of the United States is undermined by its failure to make clear its position with respect to Article 2(1),

resulting from the [general rule of interpretation], or to determine the meaning when the interpretation according to [the general rule of interpretation]: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.’ 1969 Vienna Convention (n 9) art 32.

³² Da Costa (n 1) 20–41.

³³ *ibid* 27.

³⁴ *Ibid* 71.

³⁵ Another, less convincing argument has been advanced by da Costa. She argues that a conjunctive interpretation would fall foul of the ‘principle of effectiveness’, according to which words within treaties should be interpreted so as to have effect. If a person is within the territory of a State then, so it is argued, they must be within its jurisdiction, in which case the reference to ‘jurisdiction’ adds nothing and therefore has no effect. However, a similar criticism might be levelled at a disjunctive reading: if a person within a State’s territory is necessarily subject to its jurisdiction, then the reference to territory as an additional basis for application arguably adds nothing. *ibid* 70–71. Milanovic counters this latter argument by suggesting that the disjunctive reading means that a State may be required to meet certain ICCPR obligations even where it no longer exercises effective control over its own territory; i.e. the ICCPR applies to territory in which a State no longer has jurisdiction. Milanovic (n 1) 226. Understood this way, the disjunctive reading does not fall foul of the principle of effectiveness. However, a related explanation might be given for the conjunctive interpretation: the reference to both territory and jurisdiction could be argued to exclude individuals who are within the territory of a State but

by means of an understanding, on its ratification of the ICCPR in 1992.³⁶ By this time, although the ICJ was yet to pronounce on the issue, the HRC had already applied the Convention extraterritorially in its comments, something that should have been apparent to the United States. While there was no obligation on the United States to state its interpretation—particularly if it considered that the language of the treaty to have been sufficiently clear—it is surprising that such an important point of disagreement with the practice of the relevant treaty body was not made clear. This is particularly so given the detail and extent of the reservations and declarations that the United States *did* make to the ICCPR.³⁷

Ultimately, the arguments for a disjunctive interpretation of Article 2(1) have to be weighed against what is undeniably the more natural, conjunctive, reading of the text itself. There is considerable force to the assertion that the disjunctive reading is the more consistent with the apparent object and purpose of the ICCPR, and the *travaux préparatoires* are insufficiently clear to indicate decisively otherwise. However, the most important point relates not to the merits of a particular approach to treaty interpretation, but rather to the fact that the disjunctive reading has the unambiguous endorsement of the HRC and, more importantly, the ICJ. Even if States continue to disagree with the conclusions of the HRC and ICJ, their conduct will still fall to be judged by those institutions according to their settled views—and, given the influence of their positions, by other bodies too—that is, according to the disjunctive reading. Therefore, while noting the contrary position of some States, it makes sense to proceed on the basis that the disjunctive reading is to be preferred.

According to the disjunctive reading of the ICCPR, its spatial scope of application has both a clear territorial component and a clear extraterritorial

nevertheless fall outside its jurisdiction due to, for example, a loss of effective control. In sum, it is submitted that the principle of effectiveness does little to advance the argument either way.

³⁶ Van Schaack (n 19) 30–31. The same argument can be made with respect to Israel, which ratified the ICCPR only one year earlier, in 1991, again without stating its understanding as to the meaning of art 2(1). International Covenant on Civil and Political Rights, Ratification Instrument of Israel (deposited 2 October 1991, with effect from 3 January 1992) 1651 UNTS 566.

³⁷ The United States stated five reservations, five understandings and four declarations on ratification of the ICCPR. International Covenant on Civil and Political Rights, Ratification Instrument of the United States of America (deposited 8 June 1992, with effect from 8 September 1992) 1676 UNTS 543.

component. The ICCPR applies both in the territory of a State party and to persons subject to its jurisdiction. However, both limbs require further elaboration. Chapter 2 considered the first of these: what amounts to the territory of a State, particularly in the maritime domain? This chapter proceeds to address the second: while the ICCPR might be *capable* of extraterritorial effect, what does it mean to be subject to a State's jurisdiction? It is on this question that the extraterritorial scope of application of the ICCPR depends, mirroring the criteria for applicability, generally, under the ECHR and ACHR.

3.2.1.3. ACHPR

The African Charter on Human and Peoples' Rights (ACHPR),³⁸ in contrast to the ICCPR, ECHR and ACHR, is an example of a human rights treaty containing no express applicability clause. As set out above, Article 29 VCLT creates a presumption that treaties apply to the whole of the territory of States parties, but says nothing about any possible extraterritorial effect. It therefore falls to other rules of treaty interpretation to determine whether the ACHPR applies, either in whole or part, outside the territory of States Parties.

Similar arguments can be made with respect to the object and purpose of the ACHPR as are made to argue for a disjunctive reading of Article 2(1) ICCPR.³⁹ According to the preamble of the ACHPR, States parties are '[f]irmly convinced of their duty to promote and protect human and peoples' rights and freedoms'. If the purpose of the treaty is the promotion and protection of human rights—framed without geographical limit—then it would surely undermine that purpose if adherence to the standards set out in the ACHPR were to be limited in all cases only to the territory of States Parties. Plainly, the extent to which a State may promote and protect human rights overseas is limited by its competence to act outside its borders. However, as is argued in relation to the ICCPR, it would run counter to the purpose of the treaty if a State Party were not to be prohibited from *acting* contrary to human rights standards abroad, whilst agreeing to a prohibition of precisely the same conduct in its own territory.⁴⁰

³⁸ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (ACHPR).

³⁹ See above s 3.2.1.2.

⁴⁰ See above s.3.2.1.2.

The text of the ACHPR is also arguably incompatible with a strictly territorial application, given that some provisions do have, by implication, an extraterritorial 'dimension'.⁴¹ For example, Article 12(2) contains a right for individuals to return to their country of origin. Clearly, from the perspective of the country of origin, such a right must, by definition, be fulfilled with respect to an individual outside its territory (even if that person is at the border). There is also an extraterritorial dimension to Article 23, which provides for 'the right to national and international peace and security', something which cannot plausibly be described as a solely domestic matter. While these are tightly constrained situations from which it is difficult to draw broad conclusions, they are at least inconsistent with a solely territorial scope of application for the ACHPR as a whole.

There has been only very limited practice on the part of the institutions supervising the ACHPR—the African Commission and African Court—in addressing its extraterritorial application. However, what limited practice there is does appear to recognise some degree of extraterritorial effect.⁴² Most notably, in the case of *Democratic Republic of Congo v Burundi, Rwanda and Uganda*,⁴³ neither the Commission nor the respondent States Parties challenged the assertion that the ACHPR could be engaged with respect to the treatment by several States Parties of the inhabitants of DRC in the course of their occupation of the latter State. As well as being an instance of extraterritorial application, this would also fit the test of obligations arising as a result of State Parties exercising 'effective control' over areas outside their own territory,⁴⁴ a test familiar from the practice relating to the ECHR.⁴⁵

⁴¹ Takele Soboka Bulto, 'Patching the "Legal Black Hole": the Extraterritorial Reach of States' Human Rights Duties in the African Human Rights System' (2011) 27 South African J on Human Rights 249, 259–60.

⁴² *ibid* 260–63; Viljoen F, 'Communications under the African Charter: Procedure and Admissibility' in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights* (2nd edn, CUP 2008) 107–08.

⁴³ African Union, Executive Council, 'Twentieth Activity Report of the African Commission on Human and Peoples' Rights' (25–29 June 2006) EX.CL/279 (IX) 111.

⁴⁴ Sarah Joseph and Adam Fletcher, 'Scope of Application' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, OUP 2014), 132.

⁴⁵ See below s 3.2.2.

The African Commission has also referred to the extraterritorial applicability of the ACHPR in soft law documents. In its *Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa*, citing the decision in *Democratic Republic of Congo v Burundi, Rwanda and Uganda*, it states that 'States are bound by their human rights obligations while conducting counterterrorism operations abroad, including in times of armed conflict during which times international humanitarian law is also applicable.'⁴⁶ However, while supporting the broad proposition that the ACHPR is capable of extraterritorial application, neither this statement, nor the case on which it relies, give any indication as to the relevant criteria according to which extraterritorial applicability is to be determined.

The extraterritorial applicability of the ACHPR has also been referred to, albeit in passing and without detailed analysis, by the ICJ. In the *Armed Activities* case, based on many of the same facts as *Democratic Republic of Congo v Burundi, Rwanda and Uganda*, the Court repeated its earlier conclusion from the *Wall* case that the ICCPR is capable of extraterritorial application.⁴⁷ However, the Court interpreted that earlier conclusion as meaning 'that *international human rights instruments* are applicable "in respect of acts done by a State in the exercise of its jurisdiction outside its own territory", particularly in occupied territories',⁴⁸ notwithstanding that, in *Wall*, the Court was dealing specifically with the meaning of the applicability clauses of the ICCPR and Convention on the Rights of the Child. Nevertheless, the Court went on to list the ACHPR as being applicable on that basis, without noting, however, its lack of a similar applicability clause.⁴⁹ In so doing, the Court arguably read in to the ACHPR criteria for applicability based, as for the ICCPR, on the exercise of jurisdiction.⁵⁰ While the Court can be criticised for the quality of its reasoning,

⁴⁶ African Commission on Human and Peoples' Rights, 'Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa' (adopted during the 56th Ordinary Session in Banjul, Gambia, 21 April–7 May 2015) 15.

⁴⁷ *Armed Activities* (n 18) [216].

⁴⁸ *ibid* [216] (emphasis added).

⁴⁹ *ibid* [217].

⁵⁰ Ralph Wilde, 'Human Rights beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties' (2013) 12 *Chinese J Intl L* 639, 666–67.

the conclusion is arguably consistent with the object and purpose of the ACHPR, as discussed above.

Although the arguments for the extraterritorial application of the ACHPR are not yet strong enough to reach a definitive conclusion, the better position is that its application is not restricted only to the territory of States parties. However, even accepting this broad statement of principle, the limits of the ACHPR's extraterritorial application remain untested. In particular, it remains to be confirmed whether the extraterritorial application of the ACHPR will track, as suggested by the ICJ in the *Armed Activities* case, that of other human rights treaties, i.e. that it will apply extraterritorially to individuals subject to a State's jurisdiction. It would certainly be an unjustified leap to assume that it will inevitably do so; there is no strict requirement for the African system to develop consistently with any of the other systems that constitute international human rights legal regimes. However, it is submitted that reference to other systems could lead to the development of broadly consistent practice and that the decisions within other systems are likely to provide helpful indicators of how practice concerning the ACHPR is likely to develop.

3.2.1.4. CAT

The applicability of different provisions of the Convention Against Torture (CAT) varies according to the terms of each. The obligation under Article 5 to 'take such measures as are necessary to establish its jurisdiction' over offences of torture is owed in a number of enumerated situations where the offender may clearly be outside the territory of the State party, namely 'on board a ship or aircraft registered in that State; ...when the alleged offender is a national of that State; [and] when the victim is a national of that State if that State considers it appropriate.'⁵¹ While the assertion of jurisdiction on the basis of victim nationality is voluntary, the State has no choice with respect to an offence on a registered aircraft or vessel, or with respect to offenders of its own nationality. These therefore represent two very clear, and potentially wide-reaching, situations in which a State will owe obligations in connection with extraterritorial conduct.

⁵¹ CAT (n 4) art 5(1).

Article 5 also applies, as do most other CAT obligations, including the key obligations to prevent torture and other acts of cruel, inhuman or degrading treatment or punishment, ‘in any territory under [a State’s] jurisdiction’.⁵² As noted above, this formulation clearly gives rise to the territorial applicability of the provisions concerned; however, the extent to which it can apply outside a State’s own territory remains controversial. Notably, the phrase ‘in any territory under its jurisdiction’ does not lend itself so easily, if at all, to a disjunctive reading equivalent to that given by the HRC to Article 2(1) ICCPR. Nevertheless, the Committee Against Torture has clearly stated its understanding that the relevant provisions of the CAT are capable of extraterritorial application, both to overseas territory under the effective control of a State party and to individuals under the State’s effective control.⁵³

The Committee’s position arguably reflects an interpretation that best reflects the object and purpose of the treaty in question. However, the argument is weaker than with respect to the ICCPR. Although ‘territory under its jurisdiction’ can readily be understood to include overseas territory under a State’s effective control,⁵⁴ it is difficult to avoid the conclusion, reflecting the plain meaning of the text, that there must be some exercise of territorial jurisdiction—not merely personal. Even if reference is to be made to the *travaux préparatoires* then, as for the ICCPR, the most that can be said about them is that they are inconclusive.⁵⁵ Neither does subsequent State practice provide clear support for an expansive reading. Indeed, it is in the context of US and UK objections that

⁵² *ibid* arts 2(1), 11, 12, 13, 16.

⁵³ UN Committee Against Torture, ‘General Comment No 2’ (24 January 2008) UN Doc CAT/C/GC/2 (CAT General Comment 2) para 16.

⁵⁴ This is similar to the position of the United States, which considers this formulation to include areas outside its territory, but which it ‘controls as a government authority’. UN Committee Against Torture, ‘Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture: United States of America’ (19 December 2014) UN Doc CAT/C/USA/CO/3–5 para 10 (‘The Committee notes that the State party has reviewed its position concerning the extraterritorial application of the Convention and stated that it applies to “certain areas beyond” its sovereign territory, and more specifically to “all places that the State party controls as a governmental authority”, noting that it currently exercises such control at “the United States Naval Station at Guantanamo Bay, Cuba, and over all proceedings conducted there, and with respect to U.S.-registered ships and aircraft”.’).

⁵⁵ Da Costa (n 1) 296.

the Committee Against Torture has expressed most clearly its broad interpretation.⁵⁶ Finally, unlike the position adopted by the HRC with respect to the ICCPR, the Committee Against Torture's expansive interpretation of the CAT has not yet featured in the jurisprudence of the ICJ. As a result, while the Committee Against Torture's position is undeniably influential, it must be treated with a significant degree of caution.

Another different approach within CAT is taken in Article 3, which prohibits the expulsion, return or extradition of individuals 'to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.'⁵⁷ This, like the whole of the ACHPR, is not subject to any express provision as to applicability, meaning that, as discussed above, there is a presumption that it applies within the territories of States parties, but that its extraterritorial applicability must be determined according to the normal rules of treaty interpretation. As for other provisions of CAT, the Committee Against Torture has adopted a broad interpretation. In its Concluding Observations to the United States' second periodic report, the Committee was 'concerned that the State party considers that the *non-refoulement* obligation, under Article 3 of the Convention, does not extend to a person detained outside its territory.'⁵⁸ It stated, on the contrary, that '[t]he State party should apply the *non-refoulement* guarantee to all detainees in its custody...'⁵⁹ implying that Article 3 has no geographical limit in its application.⁶⁰

The Committee's interpretation is, again, more consistent with the object and purpose of CAT as an instrument intended to reduce the incidence of torture.⁶¹ A strictly territorial application would arguably undermine the prohibition on

⁵⁶ Da Costa (n 1) 277, 289.

⁵⁷ CAT (n 4) art 3(1). For discussion of *non-refoulement* see below ch 7.

⁵⁸ UN Committee Against Torture, 'Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture: United States of America' (25 July 2006) UN Doc CAT/C/USA/CO/2 para 15.

⁵⁹ *ibid.*

⁶⁰ See, for discussion, Da Costa (n 1) 297–98.

⁶¹ Furthermore, considering the *travaux*, Da Costa notes that 'it can be said that although drafters did not consider the precise possibility of exposing individuals to torture due to the transfer outside the territory of a State party, from the aim of the Convention which was referred to by drafters throughout discussions, it is clear that the prevention of torture was the main goal to be pursued by States parties.' Da Costa (n 1) 273.

refoulement by allowing a State to circumvent it by holding detainees outside of its territory, or even by transferring individuals from its territory to such a facility, before onward transfer to a State to which *refoulement* would otherwise be prohibited.⁶² Furthermore, although analysis of the *travaux* is inconclusive,⁶³ it is critical to note that the Committee's position is not undermined, as it is with respect to the other provisions of CAT discussed above, by express language with which it is hard to reconcile with broad extraterritorial applicability. Therefore, although the continued reluctance of some States to accept a broad extraterritorial applicability of CAT must be taken into consideration, particularly with respect to the practical protection that an extraterritorial detainee of such States might enjoy, the Committee's position is very persuasive.

In conclusion, the CAT presents a special case amongst the treaties under consideration. The Article 5 obligation is plainly capable of extraterritorial effect in certain, clearly prescribed, circumstances. In addition, Article 5, as well as several other obligations applicable in a 'territory under [a State's] jurisdiction', will apply extraterritorially in an area over which a State exercises effective control. Rather less convincing, however, is the position adopted by the Committee Against Torture that these provisions will also apply extraterritorially where a State exercises jurisdiction over individuals. Finally, while the Committee's position that the *non-refoulement* provision contained in Article 3 has no geographical limitation is also controversial, its argument is more persuasive and reflects, it is submitted, the better view of the law.

3.2.2. The importance and meaning of 'jurisdiction' as a concept in regulating extraterritorial application

It is clear that the concept of 'jurisdiction' is a key threshold issue with respect to the extraterritorial application of human rights treaties.⁶⁴ For the ECHR and ACHR, application of each instrument, including extraterritorial application, is governed, respectively, by what it means to be within or subject to a State

⁶² A point made by Nowak and MacArthur. Manfred Nowak and Elizabeth MacArthur, *The United Nations Convention Against Torture: A Commentary* (OUP 2008) para 181.

⁶³ Da Costa (n 1) 267–270.

⁶⁴ In *Al-Skeini*, for example, the Grand Chamber described jurisdiction as a 'threshold criterion'. *Al-Skeini*, ECtHR (n 8) [130].

Party's jurisdiction. Likewise, once it is accepted that the ICCPR is capable of extraterritorial application, the determination whether that is, in fact, the case, depends again on what it means to be subject to a State party's jurisdiction. The same is partially true of the CAT, at least with respect to those provisions of the CAT limited to application in territory under a State Party's jurisdiction.⁶⁵ While the ACHPR lacks any direct reference to jurisdiction, it is plausible, as explained above, that future practice concerning its extraterritorial application will develop along broadly the same lines in this regard as for other similar instruments.

Clearly, therefore, understanding the meaning of 'jurisdiction' in this context is central to understanding the extraterritorial applicability of IHRL treaties. Notably, it is a term that carries meaning in wider international law, referring to the authority of a State to regulate the activities of individuals and other legal persons through its domestic law.⁶⁶ That concept can be further broken down into different types of regulation: prescriptive jurisdiction, being the authority to legislate for the conduct of individuals; enforcement jurisdiction, being the authority to enforce domestic law with respect to individuals; and adjudicatory jurisdiction, being the authority to settle legal disputes relating to an individual's conduct. A significant—and sometimes controversial—body of international law deals with the question of where States enjoy such jurisdiction. While it is primarily exercised territorially, there are situations in which jurisdiction of each type may be exercised extraterritorially, usually in fairly narrowly defined circumstances.⁶⁷

The obvious question therefore arises as to whether the scope of application of human rights treaties can be determined by reference to the principle of jurisdiction under general international law.⁶⁸ Courts have often made this assumption,⁶⁹ particularly in supporting the assertion that the application of

⁶⁵ Though, as cautioned above, considerable doubt must remain as to the potential extraterritorial application of key CAT provisions. See above s 3.2.1.4

⁶⁶ Malcolm N Shaw, *International Law* (7th edn, CUP 2014) 469–505.

⁶⁷ *ibid.*

⁶⁸ Milanovic addresses this question at some length, ultimately concluding that jurisdiction, for the purposes of determining the scope of application of human rights treaties, should be equated to 'power', irrespective of the lawfulness or unlawfulness of a State's exercise of such power. Milanovic (n 1) 21–41.

⁶⁹ *ibid* 21–23.

human rights treaties is primarily territorial. However, when this approach is adopted in relation to extraterritorial application, it yields outcomes that run counter to the objects and purposes of the treaties concerned. Restricting the application of human rights treaties only to such circumstances where a State enjoys jurisdiction lawfully to exercise authority over individuals would mean that the State would not be bound to adhere to human rights standards when it *unlawfully* exercises authority, to whatever extent it does so.⁷⁰ Furthermore, many things that a State might do in contravention of substantive human rights norms—extrajudicial killing, for example—cannot sensibly be described as being exercised on account of a State’s jurisdiction, according to the meaning given it by general international law, whether such acts are committed on the territory of the State concerned or elsewhere.⁷¹

In light of these issues, to avoid the extraterritorial application of human rights treaties to only an arbitrarily narrow range of situations, it would seem that jurisdiction carries a special meaning in the context of human rights treaties, extending beyond, though in some cases encompassing, traditional notions of jurisdiction. Such meaning must include both the lawful and unlawful exercise of authority, as well as other situations where a State exercises a certain degree of control over individuals, irrespective of any legal basis for it do so. As will be shown, this is now the common approach of Courts and other bodies.

As set out above, the position of the HRC, in line with that of the ICJ, is that the ICCPR applies both to those within the territory of a State Party and to those subject to its jurisdiction.⁷² General Comment 31 goes on to explain this to mean that ‘a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.’⁷³ This applies not just to domestic acts affecting those abroad, but also ‘to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was

⁷⁰ *ibid* 26–27.

⁷¹ *ibid* 30.

⁷² HRC General Comment 31 (n 15) para 10.

⁷³ *ibid*.

obtained'.⁷⁴ Put another way, a State might exercise control over an individual absent a lawful basis for doing so.

Although the expansive interpretation given by the Committee Against Torture to the phrase 'territory under its jurisdiction' is controversial,⁷⁵ it is nevertheless informative to examine the meaning given by the Committee to the concept of jurisdiction. It has stated that territory under the jurisdiction of a State party

includes all areas where the State party exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control, in accordance with international law. The reference to "any territory" ... refers to prohibited acts committed not only on board a ship or aircraft registered by a State party, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control. ... The Committee considers that the scope of "territory" ... must also include situations where a State party exercises, directly or indirectly, *de facto* or *de jure* control over persons in detention.⁷⁶

The Committee appears to recognise the potential for the jurisdictional link to arise from either a spatial model, requiring effective control over an area, broadly defined as encompassing flagged ships and aircraft, or a personal model, requiring effective control over individuals by the authorities of the State in question.⁷⁷ As explained above, the relevance of the latter of these concepts to the CAT remains questionable in light of the express wording of the treaty itself.⁷⁸ However, it is notable that the Committee understands effective control over territory to mean *de facto* control, rather than requiring any sort of basis in law. Furthermore, notwithstanding its questionable relevance to the CAT, the

⁷⁴ *ibid.*

⁷⁵ See above s 3.2.1.4.

⁷⁶ CAT General Comment 2 (n 53) para 16. General Comment 2 specifically concerns art 2; however, the Committee has subsequently emphasised that this conception of jurisdiction applies throughout CAT. UN Committee Against Torture, 'Decision of the Committee Against Torture under Article 22 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Concerning Communication No 323/2007' (Communication submitted by JHA on behalf of PK et al, concerning Spain) (21 November 2008) UN Doc CAT/C/41/D/323/2007 (JHA v Spain) para 8.2. Furthermore, although the language of General Comment 2 focuses on the meaning of the term 'territory', the Committee has subsequently equated this with the more general meaning of 'jurisdiction'. *ibid* para 8.2.

⁷⁷ Da Costa (n 1) 293–99.

⁷⁸ See above s 3.2.1.4.

Committee's reference to a personal model of jurisdiction is consistent with the practice of other Courts and treaty bodies, discussed below.

Turning to the ECtHR, it has generated copious jurisprudence in dealing with the extraterritorial application of the ECHR, largely as a result of States parties' military activities overseas.⁷⁹ However, while the depth and breadth of the practice relating to the extraterritorial application of the ECHR is the most developed of the instruments under consideration, the ECtHR has not dealt with the issue consistently, giving rise to a confusing—and arguably confused—jurisprudence. Although some degree of clarity has now provided by the decision in *Al-Skeini*,⁸⁰ in which the Grand Chamber took the opportunity to restate the law on point, potential issues and inconsistencies remain.

Perhaps most notorious is the case of *Banković*,⁸¹ which concerned the bombing by NATO forces of a radio station in Belgrade during the conflict in Kosovo in 1999.⁸² In determining whether individuals killed or injured by the bombing were within the jurisdiction of the States involved, the Court proceeded from the basis that 'the jurisdictional competence of a State is primarily territorial',⁸³ reaching the view 'that Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case'.⁸⁴ Then, having purported to have examined the exceptional circumstances in which the Court had previously recognised the exercise of extraterritorial jurisdiction, the Court concluded that:

In sum, the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.

⁷⁹ For example, in relation to Turkey's military activities in Cyprus and in relation to the UK's involvement in the invasion and occupation of Iraq.

⁸⁰ *Al-Skeini*, ECtHR (n 8).

⁸¹ *Banković and Others v Belgium and Others* ECHR 2001–XII 333.

⁸² The background and facts are recounted at *ibid* [6]–[11].

⁸³ *ibid* [59].

⁸⁴ *ibid* [61].

...

Additionally, the Court notes that other recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State.⁸⁵

The Court thus identified an essentially spatial notion of extraterritorial jurisdiction, requiring effective control over territory, except in the case a few specific situations of *de jure* jurisdiction. The Court rejected what it referred to as ‘a “cause-and-effect” notion of jurisdiction’ and thus took the position that the obligations of a State cannot be ‘divided and tailored in accordance with the particular circumstances of the extra-territorial act in question’;⁸⁶ essentially, a State must therefore either exercise sufficient control over an area to be able to fulfil all its obligations under the ECHR, as it is required to under its own territory, or the ECHR does not apply at all. Over and above this already-narrow conception of jurisdiction, the Court introduced a further restriction according to which the applicability of the ECHR, as a regional instrument, was to be limited to the ‘legal space’, or ‘*espace juridique*’, of the States parties.⁸⁷

The *Banković* decision was widely criticized,⁸⁸ not least because it is arguably difficult to reconcile with the Court’s own jurisprudence. While the Court relied upon a series of earlier decisions emphasising the importance of effective control over territory,⁸⁹ it apparently discounted a second line of authority according to which jurisdiction had been recognised according to a model based on the exercise of jurisdiction over individuals.⁹⁰ *Issa v Turkey* concerned an allegation that Turkish soldiers had detained and killed civilians in Iraq, in

⁸⁵ *ibid* [71]–[73].

⁸⁶ *ibid* [75].

⁸⁷ *ibid* [80].

⁸⁸ See, in particular, Oliver De Schutter, ‘Globalization and Jurisdiction: Lessons from the European Convention on Human Rights’ (2006) 6 *Baltic YB of Intl L* 183, 191–96. See also Milanovic (n 1) 21–34; Sarah Cleveland, ‘Embedded International Law and the Constitution Abroad’ (2010) 110(2) *Columbia L Rev* 225, 265–66.

⁸⁹ In particular, *Loizidou v Turkey* (Preliminary Objections) Series A no 310 (ECtHR).

⁹⁰ *Banković* (n 81) [81].

circumstances where Turkey did not exercise effective control over the relevant territory.⁹¹ Similarly, in *Ocalan v Turkey*, it was alleged that the applicant's rights had been violated upon being transferred into the custody of Turkish agents in Nairobi.⁹² While the question of the extraterritorial applicability of the ECHR was not raised in either admissibility decision, and neither case had yet reached the Merits stage, the Court had proceeded on the basis that both claims were at least admissible, implying that the ECHR was at least capable of extraterritorial application outside of the narrow circumstances described in *Banković*.

Furthermore, the narrow conception of jurisdiction adopted by the ECtHR in *Banković* arguably conflicts with the object and purpose of the ECHR. As stated in its preamble, the ECHR was intended to reflect 'the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration', such rights being, by definition, universal. It is undeniably hard to reconcile such broad ambitions with an interpretation of Article 1 ECHR that permits States to act overseas in a manner that would be prohibited under the ECHR if acting within their own territories. Indeed, as Milanovic points out, this may create 'a perverse incentive for states acting outside their boundaries.'⁹³

Perhaps recognising these issues, the ECtHR has subsequently broadened its understanding of what it means to be within the jurisdiction of a State party, albeit without expressly overruling the decision in *Banković*. When *Issa v Turkey* came to be decided at the Merits stage, the Court addressed the question of extraterritorial applicability, notwithstanding that it had not been raised by the Turkish government. Drawing upon earlier decisions of the European commission, IACHR, and HRC, the Court decided that, in addition to the situation where a State exercises effective control of an area outside its territory, it 'might also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating—whether lawfully or unlawfully—in the latter State.'⁹⁴ This, the Court,

⁹¹ *Issa and Others v Turkey* App No 31821/96 (ECtHR, 16 Nov 2004).

⁹² *Öcalan v Turkey* ECHR 2005-IV 131.

⁹³ Milanovic (n 1) 30.

⁹⁴ *Issa* (n 91) [71] (citations omitted). On the facts, the Court determined that it could not be established that it had been Turkish forces that had been responsible, hence the application was dismissed. *ibid* [72]–[81].

argued arose from the principle 'that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory'.⁹⁵ Similarly, when *Ocalan v Turkey* reached the merits stage, the Court noted that it was 'common ground that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the "jurisdiction" of that State...even though in this instance Turkey exercised its authority outside its territory'.⁹⁶

The clear tension between the *Banković* and the line of authority supporting a personal model of jurisdiction has been resolved to some extent by the decision in *Al-Skeini*. That case involved a number of claims arguing that the UK owed an obligation under Article 2 ECHR (the right to life) to conduct investigations into a number of deaths alleged to have been caused by UK service personnel during the UK's occupation of Basra, Iraq, from 2003–04.⁹⁷ The claim had already been considered by the UK House of Lords under domestic human rights legislation that implements the ECHR.⁹⁸ The House of Lords had refused the claim on the grounds that the claimants were outside the UK's jurisdiction for the purposes of Article 1 ECHR. This was because, applying the statement of the law in *Banković*, the House of Lords concluded that the UK did not

⁹⁵ *ibid* [71] (citations omitted).

⁹⁶ *Öcalan* (n 92) [91].

⁹⁷ For the background and facts, see *Al-Skeini*, ECtHR (n 8) [8]–[71].

⁹⁸ *Al-Skeini and others (Respondents) v Secretary of State for Defence (Appellant), Al-Skeini and others (Appellants) v Secretary of State for Defence (Respondent) (Consolidated Appeals)* [2007] UKHL 26.

exercise effective control over Basra at the material time;⁹⁹ and, in any case, Iraq is outside the ECHR's *espace juridique*.¹⁰⁰

When the case came to be heard by the ECtHR, the Grand Chamber maintained the position set out in *Banković* that jurisdiction is primarily territorial and is exercised extraterritorially only in exceptional circumstances. It reiterated that such circumstances include 'when, through the consent, invitation or acquiescence of the Government of [a foreign] territory, it exercises all or some of the public powers normally to be exercised by that Government',¹⁰¹ and 'when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside [its] national territory'.¹⁰²

However, the Grand Chamber also considered the line of authority relating to a personal model of jurisdiction, beyond the narrow set of circumstances recognised in *Banković*. As well as *Issa* and *Ocalan*, it also considered *Al-Saadoon and Mufdhi v UK*, in which Iraqi nationals held in a UK detention facility in Iraq were held to be within the UK's jurisdiction for the purposes of Article 1 ECHR,¹⁰³ and *Medvedyev and Others v France*, in which Cambodian nationals on board a vessel in international waters were held to be within France's jurisdiction on the basis of the control exercised by French agents over

⁹⁹ *ibid* [83] (per Lord Rodger of Earlsferry, 'The evidence of senior British officers indicates that, on the ground, the available British troops faced formidable difficulties due to terrorist activity, the volatile situation and the lack of any effective Iraqi security forces. In these circumstances...I would not consider that the United Kingdom was in effective control of Basra and the surrounding area for purposes of jurisdiction under article 1 of the Convention at the relevant time. Leaving the other rights and freedoms on one side, with all its troops doing their best, the United Kingdom did not even have the kind of control of Basra and the surrounding area which would have allowed it to discharge the obligations, including the positive obligations, of a contracting state under article 2...').

¹⁰⁰ *ibid* [76]–[77] (per Lord Rodger of Earlsferry, 'The difficulty therefore is in seeing how the deceased would have fallen within the legal space of the contracting states if, as was certainly indicated in *Bankovic*, the Convention was meant to operate in an essentially regional context and not throughout the world, "even in respect of the conduct of contracting states."').

¹⁰¹ *Al-Skeini*, ECtHR (n 8) [135].

¹⁰² *ibid* [138].

¹⁰³ *Al-Saadoon and Mufdhi v the United Kingdom* ECHR 2010. The case concerned the applicability of the ECHR to Iraqi nationals detained by UK forces in Iraq, and held in a UK-controlled detention facility.

the vessel.¹⁰⁴ While the latter two cases could arguably be explained on account of the control exercised over particular areas (i.e. the detention facility and ship respectively), the Grand Chamber concluded that ‘jurisdiction in [these] cases [did not arise] solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.’¹⁰⁵ Hence the Court concluded that ‘whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual.’¹⁰⁶ Recognising that this final statement is particularly hard to reconcile with *Banković*, the Grand Chamber went on to state that, ‘In this sense, therefore, the Convention rights can be “divided and tailored”’.¹⁰⁷

Furthermore, while the Grand Chamber did not depart completely from the notion of the *espace juridique*, it interpreted the concept as meaning only that ‘where the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle be held accountable under the Convention for breaches of human rights within the occupied territory’, in order to avoid a vacuum in accountability within the ECHR’s legal space.¹⁰⁸ It emphasised, contrary to the clear impression given in the *Banković* decision, that this ‘does not imply, *a contrario*, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe Member States.’¹⁰⁹ The Grand Chamber in *Al-Skeini* therefore not only recognised that both effective control over an area and effective control over an individual could give rise to the ECHR’s extraterritorial application, but also that the ECHR’s potential extraterritorial applicability is not confined to the combined territories of its States parties.

¹⁰⁴ *Medvedyev* (n 1). For a summary of the facts, see below s 5.2.

¹⁰⁵ *Al-Skeini*, ECtHR (n 8) [136].

¹⁰⁶ *ibid* [137].

¹⁰⁷ *Ibid*.

¹⁰⁸ *ibid* [142].

¹⁰⁹ *ibid*.

In its case law subsequent to *Al-Skeini*, the ECtHR has reinforced the authority of that judgment through the incorporation, verbatim, of the section dealing with extraterritorial application into later judgments.¹¹⁰ However, the Court has still not gone so far as actually to overrule the decision in *Banković* either explicitly or, arguably, implicitly. Indeed, its reference to *Banković* in support of its reasoning in *Al-Skeini* maintains the impression, at least, that *Banković* should still be considered good law. Consequently, it remains arguable that the model of personal jurisdiction set out in *Al-Skeini* should be interpreted so as to remain compatible with the decision on the facts in *Banković*. This, it seems, is what the Grand Chamber did in its application of the newly restated law to the facts of *Al-Skeini*. In finding the ECHR to apply to the use of lethal force against Iraqi civilians by UK soldiers, the Grand Chamber did so with express reference to the exercise by the UK of ‘public powers’—specifically the UK’s responsibility for security—in the area and at the time in question.¹¹¹ Indeed, in deciding that the ‘jurisdictional link between the deceased and the United Kingdom’ had been established, the Grand Chamber made express reference to the fact that the soldiers had been engaged in ‘security operations’ related to the UK’s responsibility for security.¹¹²

The reference to ‘public powers’ raises the question whether the use of force by the soldiers would, without this feature being present, have been sufficient to engage the UK’s obligations under the ECHR. If this were the case, then it would seem impossible to reconcile with the decision on the facts of *Banković*, hence, arguably, the imposition by the Court of the additional contextual requirement. Therefore, while it seems clear that the jurisdictional link will be established when a State agent exercises authority and control over an individual whom he or she detains, this being the case in each of the previous decisions relied upon by the Grand Chamber in reaching its decision in *Al-Skeini*, the situation is less clear with respect to other uses of physical force.

The question this raises—whether the use of force alone is sufficient to bring an individual within the jurisdiction of a State for the purposes of Article 1 ECHR—

¹¹⁰ *Hassan v the United Kingdom* ECHR 2014 [74]; *Jaloud v the Netherlands* ECHR 2014 [139].

¹¹¹ *Al-Skeini*, ECtHR (n 8) [149].

¹¹² *ibid.*

is important in determining the reach of the ECHR in the context of military operations, including MSOs. If it *is* sufficient, then any use of force by the military will engage human rights obligations. This is particularly significant in the conduct of armed conflict, where armed forces will often use force extraterritorially without any level of control over the territory in question, noting that application of human rights norms in these circumstances raises difficult issues relating to the relationship between human rights law and international humanitarian law.¹¹³

Subsequent decisions support the contention that the personal model of jurisdiction set out in *Al-Skeini* remains subject to limitations as to the type of authority and control that may qualify. In *Hirsi Jamaa v Italy*, the Grand Chamber implied that the personal model of jurisdiction may be subject to an exception, arising from the continued validity of the *Banković* decision, according to which jurisdiction cannot arise from ‘instantaneous extraterritorial act[s]’.¹¹⁴ In *Jaloud v The Netherlands*, which concerned an allegation that Dutch forces had shot and killed a civilian passing through a checkpoint in Iraq, the Grand Chamber relied on the exercise by the Netherlands of authority and control over individuals passing through a checkpoint, generally, rather than reaching the same conclusion, more simply, on the basis of the use of physical force alone.¹¹⁵

Notwithstanding the jurisprudence, as a matter of principle it is arguably unsustainable to suggest that physical force alone will not engage human rights obligations, while accepting the sufficiency of detention.¹¹⁶ When the question

¹¹³ See, for example, for a discussion of this complex issue, Milanovic (n 1) 229–61.

¹¹⁴ *Hirsi Jamaa* (n 2) [73]. However, see the analysis by the UK High Court on this point in *Al-Saadoon and Others v Secretary of State for Defence* [2015] EWHC 715 (Admin) (*Al-Saadoon*, UK High Court) [101]–[102]. The case is discussed further below.

¹¹⁵ *Jaloud* (n 110) [152].

¹¹⁶ As Milanovic states the issue, ‘What, then, have we learned about the personal model? It cannot be limited to physical custody. It cannot be limited on the basis of nationality or some special status of the victim, or indeed of the perpetrator. It cannot be limited only to lawful exercises of state power over individuals, nor to extraterritorial acts to which the host state consents, nor indeed to acts committed under the colour of law. It cannot, in short, be limited on the basis of *any* non-arbitrary criterion. “Authority and control over individuals” as a basis for state jurisdiction simply boils down to the proposition

was addressed domestically at first instance by the UK High Court in the case of *Al-Saadoon and Others v Secretary of State for Defence*,¹¹⁷ the court held that no ‘principled system of human rights law [could] draw a distinction between killing an individual after arresting him and simply shooting him without arresting him first.’¹¹⁸ If such distinctions are to be avoided then jurisdiction cannot depend on the exercise of some purported legal authority—real or otherwise—but rather, as the Court in *Al-Saadoon* found, ‘whenever and wherever a [State party] purports to exercise legal authority or uses physical force, it must do so in a way that does not violate [ECHR] rights.’¹¹⁹ Based largely on such arguments of principle, the High Court thus concluded that physical force could be sufficient, in itself, to establish the necessary jurisdictional link. However, while the High Court in *Al-Saadoon* presented sound arguments of principle, it could not adequately account for the failure of the Grand Chamber expressly to overrule *Banković*, with which its decision clearly conflicted.¹²⁰ Indeed, this issue was recognised when *Al-Saadoon* came to be considered by the UK Court of Appeal, which stated that:

The Strasbourg court in *Al-Skeini* has departed from *Bankovic* in accepting a ground of extra-territorial jurisdiction founded on state agent authority and control which is, on any view, of enormous breadth. I accept that once this exception is admitted it becomes acutely difficult to distinguish between differing degrees of authority and control which may or may not as a result give rise to extra-territorial jurisdiction. As the judge demonstrated in his powerful judgment, the genie having been released from the bottle, it may now prove impossible to contain.¹²¹

Notwithstanding this dilemma, the Court of Appeal nevertheless concluded that the Grand Chamber had, indeed, intended to set limits on the personal model of jurisdiction set out in *Al-Skeini*. The Court of Appeal went on to state that:

that a state has obligations under human rights treaties towards all individuals whose human rights it is able to violate.’ Milanovic (n 1) 207.

¹¹⁷ *Al-Saadoon*, UK High Court (n 114)”

¹¹⁸ *ibid* [95].

¹¹⁹ *ibid* [106].

¹²⁰ David S Goddard, ‘Applying the ECHR to the Use of Physical Force in *Al-Saadoon*’ (2015) 91 *Intl L Studies* 402, 419.

¹²¹ *Al-Saadoon and others (Appellants) v The Secretary of State for Defence (Respondent), Rahmattullah and another (Appellant) v The Secretary of State for Defence and another (Respondents)* [2016] EWCA Civ 811 (*Al-Saadoon*, UK Court of Appeal) [62].

If it had been the intention of the Grand Chamber to create an all-embracing principle of extra-territorial jurisdiction of the breadth of that accepted by the judge, it would have been an even greater departure from the previous authorities, requiring a particularly clear, express statement. On the contrary, all the indications are that the Grand Chamber intended to set limits on the scope of this exception.¹²²

Following the Court of Appeal's carefully considered reasoning, the application of the ECHR on the basis of the use of physical force alone remains a plausible future development rather than an accurate statement of the law as it currently stands.

To summarise the current status of the extraterritorial application of the ECHR, *Al-Skeini* has undoubtedly brought a degree of clarity. It is clear that an individual can fall within the jurisdiction of a State party for the purposes of Article 1 ECHR either through the exercise of effective control by that State over territory in which the individual is located, or through the exercise of authority and control by a State agent over that individual. In the latter case, the rights protected can be divided and tailored to the particular circumstances. However, while a State agent will undoubtedly exercise authority and control over an individual when he or she detains that individual, where the use of physical force alone is concerned, the better view of the current law is that there must be an additional contextual element, which in *Al-Skeini* was the exercise of public powers. On the other hand, the enduring authority of the *Banković* decision arguably reinforces the continued validity of the additional exceptional cases of *de jure* extraterritorial jurisdiction noted in that case. Of particular relevance to the conduct of MSOs is the jurisdiction of States over vessels flying its flag, a situation discussed in further detail below.

Turning to the American system, the extraterritorial applicability of the ACHR has been addressed on several occasions by the IACHR, which draws heavily on the jurisprudence of the ECtHR. In *Victor Saldano v Argentina*, which concerned the right to life of an individual sentenced to death and held, awaiting execution, in the United States,¹²³ the Commission stated:

¹²² *ibid* [63].

¹²³ *Victor Saldano v Argentina*, Petition, Report No 38/99, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.95 Doc 7 rev at 289 (1998) [2].

The Commission does not believe, however, that the term "jurisdiction" in the sense of Article 1(1) is limited to or merely coextensive with national territory. Rather, the Commission is of the view that a state party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state's own territory.¹²⁴

The IACHR went on to note the European Commission's view in *Cyprus v Turkey* 'that the High contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad',¹²⁵ and that '[t]his understanding of jurisdiction—and therefore responsibility for compliance with international obligations—as a notion linked to authority and effective control, and not merely to territorial boundaries, has been confirmed and elaborated on in other cases decided by the European Commission and Court.'¹²⁶ On the facts of *Victor Saldano*, the State party concerned, Argentina, had exercised no authority or control over Mr Saldano in connection the extraterritorial criminal proceedings against him; he was not, therefore, within the jurisdiction of Argentina for the purposes of Article 1(1) ACHR.¹²⁷

The Commission refined its understanding of jurisdiction for the purposes of Article 1(1) ACHR in *Armando Alejandro Jr, Carlos Costa, Mario de la Peña and Pablo Morales v Republic of Cuba*,¹²⁸ which concerned the alleged shooting down of two civilian aircraft in international airspace by Cuban military fighter planes.¹²⁹ The Commission stated that:

Because individual rights are inherent to the human being, all the American states are obligated to respect the protected rights of any person subject to their jurisdiction. Although this usually refers to persons who are within the territory of a state, in certain instances it can refer to extraterritorial actions, when the person is present in the territory of a state but subject to the control of another state, generally through the actions of that state's agents abroad. In principle, the investigation refers not to the nationality of the alleged victim or his presence in a particular geographic

¹²⁴ *ibid* [17].

¹²⁵ *Cyprus v Turkey* (Admissibility) (1975) 2 DR 125, 136.

¹²⁶ *Victor Saldano* (n 123) [18]–[19] (citation omitted).

¹²⁷ *ibid* [21].

¹²⁸ *Armando Alejandro Jr, Carlos Costa, Mario de la Peña y Pablo Morales v Cuba*, Case 11.589, Report No 86/99, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.106 Doc 3 rev at 586 (1999).

¹²⁹ *ibid* [1].

area, but to whether, in those specific circumstances, the state observed the rights of a person subject to its authority and control.¹³⁰

Considering the facts of the case itself, the Commission concluded that it had

examined the evidence and [found] that the victims died as a consequence of direct actions taken by agents of the Cuban State in international airspace. The fact that the events took place outside Cuban jurisdiction does not limit the Commission's competence *ratione loci*, because, as previously stated, when agents of a state, whether military or civilian, exercise power and authority over persons outside national territory, the state's obligation to respect human rights continues...¹³¹

This is significant not only for the Commission's confirmation of its view that the exercise of extraterritorial authority and control is sufficient to bring an individual within a State's jurisdiction, but also for the conclusion that a State agent can exercise such authority and control through the use of force alone or, more broadly, arising from an instantaneous act.¹³² This is in stark contrast to the ECtHR's conclusion, on arguably similar facts, in *Banković*, and affords a broader meaning to jurisdiction in this context than even *Al-Skeini*, eschewing any reference, for example, to the exercise of public powers. As discussed above, such a conclusion arguably reflects the logical outcome of adopting a personal model of jurisdiction, consistent with the reasoning of the UK High Court in *Al-Saadoon* discussed above, albeit that the ECtHR remains encumbered by more restrictive, and arguably contradictory, jurisprudence.

The IACHR subsequently applied the same reasoning in *Meneses and others v Ecuador*,¹³³ finding a group of Colombian citizens potentially to have been within the jurisdiction of a State party (Ecuador) on the alleged basis that they had been shot by members of the Ecuadorian Army within Colombian territory.¹³⁴ It considered itself able to hear the petition on the basis simply 'because [it] claims violations of the rights protected under the American Convention that were said to have been perpetrated by agents of the State of

¹³⁰ *ibid* [23] (citations omitted).

¹³¹ *ibid* [25].

¹³² Helena De Vylder, 'The Territorial Scope of the American Convention on Human Rights' (2014) 7 *Inter-American & Eur Human Rights J* 204, 219.

¹³³ *Danny Honorio Bastidas Meneses and others v Ecuador*, Admissibility, Petition 189-03, Report 153/11 (IACHR, 2 November 2011).

¹³⁴ For the facts, see *ibid* [6]–[7].

Ecuador.’¹³⁵ Similarly, in *Molina v Ecuador*,¹³⁶ the Commission found Ecuadorian nationals potentially to have been within the jurisdiction of Colombia as a result of bombing and other military action conducted by the Colombian armed forces in Ecuador. Consistent with the other cases discussed, the Commission stated that

the following is essential for the Commission in determining jurisdiction: the exercise of authority over persons by agents of a State even if not acting within their territory, without necessarily requiring the existence of a formal, structured and prolonged legal relation in terms of time to raise the responsibility of a State for acts committed by its agents abroad. At the time of examining the scope of the American Convention's jurisdiction, it is necessary to determine whether there is a causal nexus between the extraterritorial conduct of the State and the alleged violation of the rights and freedoms of an individual.¹³⁷

However, consistent with the ECtHR's conclusion in *Al-Skeini* that the rights of the ECHR could be ‘divided and tailored’ when a State party brings an individual within its jurisdiction through the extraterritorial acts of its agents, the Commission went on to say:

What has been stated above does not necessarily mean that a duty to guarantee the catalogue of substantive rights established in the American Convention may necessarily be derived from a State's territorial activities, including all the range of obligations with respect to persons who are under its jurisdiction for the (entire) time the control by its agents lasted. Instead, the obligation does arise in the period of time that agents of a State interfere in the lives of persons who are on the territory of the other State, for those agents to respect their rights, in particular, their right to life and humane treatment.¹³⁸

Hence a State party may owe only the obligations relevant to the conduct of its agents abroad. Conversely, the inability of a State party to fulfil the full range of obligations under the ACHR does not mean that the instrument ceases to apply.¹³⁹

¹³⁵ *ibid* [23].

¹³⁶ *Franklin Guillermo Aisalla Molina v Ecuador*, Case IP-02, Report No 112/10, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.140 Doc 10 (2010).

¹³⁷ *ibid* [99].

¹³⁸ *ibid* [100].

¹³⁹ De Vylder (n 132) 220.

It is clear from this survey of the IACHR's practice that it considers the ACHR as being capable of extraterritorial application through the exercise of authority and control by agents of a State acting outside its territory. Indeed, as De Vylder notes, 'central in the Inter-American concept of jurisdiction are the authority and control over a person.'¹⁴⁰ Furthermore, authority and control in this context can mean simply the instantaneous use of physical force, in which case the State party is required at least to respect the rights relevant to that particular conduct.

Although the Commission's practice on this point is informative, particularly for its treatment of situations involving military activities, it does not necessarily mean that the issue will be approached in the same way by the Inter-American Court of Human Rights (IACtHR), which, until recently, had not dealt with it.¹⁴¹ However, in its recent *Advisory Opinion on the Environment and Human Rights*,¹⁴² the Court addressed the question for the first time, drawing upon the practice of the Commission, as well as the ECtHR and HRC.¹⁴³ The Court confirmed that States' jurisdiction, for the purposes of the ACHR, is not limited to their territories, though must be 'examined restrictively in each specific case.'¹⁴⁴ It concluded that 'an individual is under a State's jurisdiction, in respect of conduct undertaken outside the territory of the said State (extraterritorial conduct) or with effects outside its territory, if that State is exercising its authority over that person or when that person is under its effective control'.¹⁴⁵

¹⁴⁰ *ibid* 223.

¹⁴¹ As De Vylder notes, the Court arguably had the opportunity to do so on at least two earlier occasions but had declined to do so. *ibid* 207–09.

¹⁴² *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)* (Advisory Opinion OC-23/17) Inter-American Court of Human Rights Series A No 23 (15 November 2017).

¹⁴³ *ibid* [79].

¹⁴⁴ *ibid* [81].

¹⁴⁵ *ibid*. This translation is that which is given by Giovanny Vega-Barbosa and Lorraine Aboagye. Giovanny Veba-Barbosa and Lorraine Aboagye, 'Human Rights and the Protection of the Environment: The Advisory Opinion of the Inter-American Court of Human Rights' (*EJIL Talk!*, 26 February 2018) <<https://www.ejiltalk.org/human-rights-and-the-protection-of-the-environment-the-advisory-opinion-of-the-inter-american-court-of-human-rights/>> accessed 6 July 2018. This is a more faithful translation than that which is provided in the English version of the official summary, which states that jurisdiction, in the context of the ACHR, encompasses situations in which a State 'exercises effective authority or control over an individual or individuals, either within or

Although less detailed than the analysis found in the practice of the Commission, the IACtHR appears to have adopted its approach, focusing on extraterritorial applicability arising from the exercise of authority and control over individuals.

Taken as a whole, the analysis of practice relating to the meaning of jurisdiction in this context reveals a complex legal landscape. The concept has developed over time so as increasingly to embrace an expansive conception of jurisdiction that is not restricted to its meaning elsewhere in the law. However, important vestiges of familiar notions of jurisdiction remain, most notably in the context of the ECHR. It would therefore be a mistake to conclude that jurisdiction for the purposes of defining the extraterritorial application of human rights treaties is unconnected to its other meaning(s) in international law. As will be discussed below in the context of the maritime environment, there are specific situations where *de jure* jurisdiction remains particularly relevant to the extraterritorial application of human rights treaties. In the context of MSOs, this is most notably the case with respect to operations conducted by a State on board vessels carrying that State's own flag.¹⁴⁶

However, this important caveat notwithstanding, authorities regularly refer, albeit with slightly differing language, to the exercise of *de facto*, rather than *de jure*, authority and control. The practice recognises, broadly speaking, two distinct instances of this: first, a spatial model, where jurisdiction is equated to the exercise by a State of effective control over an area; and, second, a personal model, whereby jurisdiction is established when an agent of the State exercises authority and control over an individual. While not all systems have developed detailed jurisprudence on point, it is submitted that their practice is broadly consistent with this statement and the approach is likely to be influential in the future development and application of the law. However, notwithstanding the similarity of the approaches developed for the extraterritorial application of the ICCPR, ECHR and ACHR, there remain important differences, including,

outside its territory.' *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)* (Advisory Opinion OC-23/17) (Official Summary Issued by the Inter-American Court) (2017) 3.

¹⁴⁶ See below s 3.3.2.

most notably, the different approach to situations involving the use of physical force by State agents.

3.3. The application of the principles governing the extraterritorial application of IHRL treaties to MSOs

Having considered the extraterritorial application of relevant human rights in general, the next question is how the principles identified above apply in the maritime context and, specifically, to MSOs that are conducted outside a State's territory. While there is limited practice on point, this is insufficient, on its own, to plot all of the relevant legal contours. Noting that MSOs can take various forms, are comprised of numerous discrete activities, and can be conducted in a wide range of circumstances, the decided cases lack sufficient breadth in the factual scenarios they contemplate. Furthermore, as set out above, there is divergence in the broader practice concerning the extraterritorial application of the treaties under consideration; as a result, there is a limit to the extent that it is possible to draw broad conclusions of universal application from decisions applying just one of the treaties in question. Therefore, while it is necessary to consider cases dealing directly with the relevant issues, understanding the full scope of application of IHRL treaties to MSOs cannot be based on these alone. Instead, it is necessary to consider the principles on which extraterritorial application is to be determined generally and to examine how those principles might operate in a maritime context.

3.3.1. Applicability arising from the nationality of an individual committing acts of torture

A special situation of extraterritorial applicability arises in the case of Article 5 CAT, which contains an obligation on the part of a State to assert jurisdiction over offences of torture where the offender is of the nationality of the State concerned. As noted above, this is one of the specific circumstances in which the obligation is expressly stated to arise, wherever the offence is alleged to have been committed.¹⁴⁷ This narrow obligation is likely to apply to most of those conducting MSOs on behalf of a State, given that they are likely to be

¹⁴⁷ See above s 3.2.1.4.

nationals of that State. Where it is engaged, the obligation will apply at every stage of the operation, wherever it is conducted.

3.3.2. Applicability arising from a vessel's flag

A second special case of extraterritorial application may arise with respect to a State's own flagged vessels. In connection with the execution of MSOs, there are two situations where this may be relevant: first, where the MSO involves action taken on board an interdicted vessel that flies the flag of the interdicting State; and, second, where individuals are taken on board the interdicting vessel in the course of the MSOs, such as may be the case for detainees, or where mariners are rescued. If the jurisdictional link can be established on this basis, it follows that the instrument will apply throughout the whole of a vessel flagged to the State in question, without any requirement to consider the *de facto* exercise of effective control over the vessel or authority and control over particular individuals.

Applicability on a State's flagged vessels can be provided for expressly in the treaty in question. Under Article 5 CAT, a State Party is obliged to 'take such measures as are necessary to establish its jurisdiction' over acts of torture committed 'on board a ship or aircraft registered in that State'. More generally, while a vessel does not constitute part of the territory of its flag State,¹⁴⁸ the latter enjoys both prescriptive and enforcement jurisdiction over vessels flying its flag. On the high seas, enforcement jurisdiction is generally exclusive to the flag State,¹⁴⁹ albeit subject to a number of limited exceptions.¹⁵⁰ In other maritime zones the coastal State may also enjoy both prescriptive and enforcement jurisdiction for some purposes. However, neither on the high seas, nor in other maritime zones, does the concurrent jurisdiction of another State affect the continued jurisdiction enjoyed by the flag State. While a flag State may be limited in the action it may practically and lawfully take to enforce its laws when a flagged vessel is in the territorial sea, internal waters or

¹⁴⁸ Urfan Khaliq, 'Jurisdiction, Ships and Human Rights Treaties' in Henrik Ringbom (ed), *Jurisdiction Over Ships: Post-UNCLOS Developments in the Law of the Sea* (Brill 2015) 329.

¹⁴⁹ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS) art 92(1).

¹⁵⁰ See above s 1.1.3.2. See also Shaw (n 66) 445–55.

archipelagic waters of another State, this does not preclude the concurrent existence of the flag State's enforcement jurisdiction *on board* the flagged vessel. For example, while a State would not be permitted, absent consent, to send its coastguard vessels into a foreign territorial sea in order to enforce its laws on board one of its own flagged vessels, such action being outside the innocent passage regime, State agents already on the vessel in question would still be permitted to enforce the flag State's jurisdiction despite its location in the maritime territory of another State.

As discussed above, where the extraterritorial applicability of human rights treaties depends on the existence of a jurisdictional link between the State and an individual, that link does not necessarily require the existence of *de jure* jurisdiction. However, this does not mean that *de jure* jurisdiction, such as that of a State over its flagged vessels, even if not necessary, might not be sufficient. This, after all, is the basis for the territorial application of both the ECHR and ACHR, which refer only to applicability to individuals within their jurisdiction. Moreover, the extraterritorial applicability of the ECHR over a State's flagged vessels was a specific exception to that instrument's primarily territorial applicability recognised by the Grand Chamber in *Banković*.¹⁵¹ As discussed above, while the ECtHR's jurisprudence has undoubtedly moved on to some extent since *Banković*, there is no plausible reason to question the continued validity of this specific conclusion. Indeed, this appears to have been the case in *Hirsi Jamaa and Others v Italy*, decided subsequent to *Al-Skeini*. In *Hirsi Jamaa*, which considered the applicability of the ECHR to irregular migrants taken on board Italian naval vessels, the Grand Chamber considered the ECHR to apply on board Italian 'military ships flying the Italian flag' while the ships in question were on the high seas.¹⁵² Importantly, it was the status of the vessels as being Italian-flagged, rather than their 'military' designation, on which the Grand Chamber based its reasoning, which referred to the exclusive jurisdiction enjoyed by flag States on the high seas.

¹⁵¹ *Banković* (n 81) [73].

¹⁵² *Hirsi Jamaa* (n 2) [76]–[78]. See, for example, Maarten Den Heijer, 'Reflections on *Refoulement* and Collective Expulsion in the *Hirsi* Case' (2013) 25(2) Intl J of Refugee L 265, 271–74. As Den Heijer notes, the Grand Chamber referred both to *de jure* (flag State) jurisdiction and to the *de facto* control exercised by the Italian forces over the individuals. See below s 3.3.4.

Notably, when the Grand Chamber stated in *Banković* that the ECHR could apply extraterritorially on the basis of flag State jurisdiction, this was at the same time that it declared the ECHR could not be 'divided and tailored'.¹⁵³ While such dividing and tailoring is now accepted post-*Al-Skeini*,¹⁵⁴ it arguably follows that the ECtHR envisaged the applicability of the *whole* of the ECHR when it applies on board a flagged vessel, as it does in a State's territory, rather than just those rights engaged by a particular exercise of *de facto* jurisdiction. Hence a State party would be required not only to respect relevant rights in the course of any action it took, but also to meet its positive obligations to protect and fulfil human rights.

Consistent with the practice of the ECtHR, the Committee Against Torture has also interpreted every provision of CAT applicable in 'territory under [a State party's] jurisdiction' as applying in 'a ship or aircraft registered by a State party',¹⁵⁵ notwithstanding that Article 5, but no other, is made subject to an express additional provision to that effect. However, although the practice of the Committee Against Torture and ECtHR supports the contention that the relevant provisions of CAT, and the whole of the ECHR, apply extraterritorially on board a State's flagged vessels, for the other instruments under consideration, no clear and authoritative guidance on this specific point yet exists. If, in contrast to the position taken by the Committee and ECtHR, extraterritorial application in these circumstances is found to depend on a factual determination as to whether a State exercises authority and control over individuals, as has been the dominant approach, for example, with respect to the ACHR,¹⁵⁶ then reliance on the notion of jurisdiction over flagged vessels might arguably be misplaced.

In relation to its negative obligations, when a State *does* take action on board a vessel flying its flag, it would be hard to characterise it as anything but a *de facto* exercise of control or authority such as to engage human rights obligations. However, the same analysis does not necessarily hold with respect to positive obligations. If extraterritorial application in that context requires the exercise of a certain level of control, then it must be open to question whether a

¹⁵³ *Banković* (n 81) [73], [75].

¹⁵⁴ See above s 3.2.2.

¹⁵⁵ CAT General Comment 2 (n 53) para 16.

¹⁵⁶ See above s 3.2.2.

flag State *necessarily* exercises sufficient control over vessels flying its flag, or whether an assessment must be made whether a State is, *in fact*, exercising control.¹⁵⁷

An answer to this question possibly lies in the provisions of UN Convention on the Law of the Sea (UNCLOS), according to which a flag State not only *has* jurisdiction but is obliged also to ‘effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.’¹⁵⁸ Furthermore, a ship may be flagged only to a State with which it has a ‘genuine link’.¹⁵⁹ Given the obligation of a flag State to exert its authority over vessels flying its flag, it might follow that it should similarly be required to meet its positive obligations under human rights treaties. If it cannot do so, then arguably it could not be said that a sufficiently genuine link exists and the flag State should not therefore authorise the use of its flag.

3.3.3. *Applicability arising from the exercise of effective control over an area*

As set out above,¹⁶⁰ one of the situations where some human rights treaties have been considered to apply extraterritorially is where a State exercises effective control over a particular area outside its territory. If applicability of a human rights treaty were to arise on this basis, then it would apply to the conduct of MSOs conducted by the State exercising effective control over the area in which the MSO was conducted. It would follow that the rights protected by the treaty in question would apply at all stages of the MSO, without reference to the exercise of control over a particular vessel or its occupants. However, not all treaties have been applied on this basis. In particular, while extraterritorial applicability of the ECHR on this basis is well established, and is arguably the only basis for the extraterritorial application of many provisions of the CAT,¹⁶¹

¹⁵⁷ Khaliq (n 148) 339.

¹⁵⁸ UNCLOS (n 149) art 94.

¹⁵⁹ *ibid* art 91(1).

¹⁶⁰ See above s 3.2.2.

¹⁶¹ See above s 3.2.1.4.

this is not the case for the ACHR, in respect of which the IACHR has generally adopted a personal model of extraterritorial jurisdiction.¹⁶²

Moreover, even though courts and treaty bodies have not expressly excluded the concept's application to the maritime domain, it has generally been explained and applied in the context of the exercise of effective control over land, specifically the situation where a State exercises effective control over the territory of another State through the lawful or unlawful actions of its armed forces, displacing the authority normally exercised by the territorial State. Courts and treaty bodies have not, generally, contemplated the exercise of effective control over an area beyond the territory of *any* State, such as would be the case on the high seas, or in the other maritime zones seaward of the territorial sea.

For example, in setting out the principle in *Al-Skeini*, the ECtHR refers to 'domination over *the territory*' and, repeatedly, to interaction with the 'local administration'.¹⁶³ Likewise, where provisions under the CAT apply in 'territory under a State's jurisdiction', this most plausibly refers to control over areas otherwise considered to be 'territory', notwithstanding that the Committee Against Torture has construed the phrase broadly to include *de facto* effective control over any 'area'.¹⁶⁴ It follows that the principle could most convincingly apply to the exercise of effective control over the territorial sea, internal waters and archipelagic waters of another State. Such a situation would be closely analogous to the established application of the principle on land; the areas of water in question are within the territory of the coastal State, whose authority is displaced by the State exercising effective control. A second situation where the principle might plausibly be applied is where, as a corollary to the concept of flag State jurisdiction, a State exercises effective control over a foreign-flagged vessel.¹⁶⁵ In this situation, again, a State normally has jurisdiction over the area

¹⁶² See above s 3.2.2.

¹⁶³ *Al-Skeini*, ECtHR (n 8) [138]–[139] (emphasis added).

¹⁶⁴ See above s 3.2.1.4.

¹⁶⁵ Such a possibility appears to have been contemplated at least by the ECtHR; in *Medvedyev* the ECtHR found the ECHR to have applied on the basis of the exercise by France of 'full and exclusive control over the [vessel] and its crew'. *Medvedyev* (n 2) [67].

in question—i.e. the jurisdiction of the flag State over the vessel—and it is this authority that is displaced by a State exercising effective control.

It is less clear whether the principle could apply to the exercise of effective control over an area of sea, rather than a vessel, beyond the territory of any State. While there is little judicial support for such a proposition, it has not been expressly excluded and could arguably, at least in theory, be accommodated within the concept's stated parameters. Notwithstanding the ECtHR's references in *Al-Skeini* to territory and local administration, the Court initially defined the principle simply as the 'effective control of an area outside [a State's own] national territory'. Indeed, the Court stated that, 'In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area', an indicium clearly that does not depend on the displacement of a territorial authority. While the Court's full explanation seems to have assumed the existence of a local administration, this could arguably have been because that was the context of the case in question, rather than because it was considered to be essential to the operation of the principle.

In this connection, it is particularly relevant to consider those maritime areas that are beyond a State's territory, but within which it nevertheless enjoys certain rights under the law of the sea, namely the contiguous zone, exclusive economic zone (EEZ), continental shelf, as well as safety zones established around certain installations. The contiguous zone is a zone contiguous to the territorial sea, over which a State may exercise the control necessary to prevent and punish infringement of its customs, fiscal, immigration and sanitary laws and regulations within its territory or territorial sea.¹⁶⁶ Within its EEZ, a State has 'sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds', as well as 'jurisdiction...with regard to (i) the establishment and use of artificial islands, installations and structures; (ii) marine scientific research; [and] (iii) the

¹⁶⁶ UNCLOS (n 149) art 33.

protection and preservation of the marine environment'.¹⁶⁷ The continental shelf is an area of sea-bed and subsoil over which a State has sovereign rights to explore and exploit its natural resources. It extends up to 350 nautical miles from the baseline from which the territorial sea is measured and is defined according to bathymetry.¹⁶⁸ Finally, safety zones may be established around artificial islands, installations and structures in the EEZ or on the continental shelf,¹⁶⁹ as well as around installations constructed either to exploit the international seabed area,¹⁷⁰ or for scientific research.¹⁷¹ Within such safety zones, the establishing State may take 'appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures.'¹⁷²

In all of these areas, it is clear that the coastal State, or State establishing a safety zone, enjoys certain rights, including enforcement jurisdiction in connection with the protection of specified interests. However, it is important to note that the determination of whether or not a State exercises effective control is a matter of fact rather than law. The legal right of a State to exercise jurisdiction for some purposes within a particular area outside its territory does not, in itself, give rise to effective control, meaning that it will be necessary to determine, as a matter of fact, whether a State exercises effective control over a particular area, whatever *de jure* rights it might enjoy there. As noted above,¹⁷³ the application of human rights treaties on the basis of effective control over an area has been considered—at least in the case of the ECHR—to entail the application of the whole treaty, rather than just those rights pertinent to the

¹⁶⁷ *ibid* art 56(1)(a)–(b). States may establish EEZs that extend up to 200 nautical miles from the baseline from which the territorial sea is measured. *ibid* art 57.

¹⁶⁸ *ibid* arts 76–77. The rights attached to the continental shelf do not affect the legal status of the superjacent waters. *ibid* art 78(1).

¹⁶⁹ *ibid* arts 60, 80.

¹⁷⁰ *ibid* art 147.

¹⁷¹ *ibid* art 260.

¹⁷² *ibid* art 60(4). This particular wording applies strictly only to safety zones established around artificial islands, installations and structures established in the EEZ or on the continental shelf. However, a similar provision applies to installations in the international seabed area. *ibid* art 147(2)(c). Those established around scientific research installations are to be created 'in accordance with the relevant provisions of this Convention', presumably referring to the provisions concerning other safety zones. *ibid* art 260.

¹⁷³ See above s 3.2.2.

actions of the State in question. As the concept of effective control is related to the ability of a State to fulfil the full gamut of its human rights treaty obligations, it follows that the threshold for effective control is high. Hence, even during the occupation of part of Iraq by British forces, the United Kingdom was not considered to have been in effective control such as would have given rise to the application of the whole of the ECHR.¹⁷⁴ Consequently, it is difficult to envisage a situation where a State could exercise sufficient control over a substantial extraterritorial area of the sea such that the whole of a human rights treaty could realistically apply. Indeed, it would be difficult to reconcile that level of control with the freedoms afforded vessels in such areas.¹⁷⁵

A more plausible basis on which to recognise the extraterritorial application of human rights treaties in such situations is in connection with the *exercise* of jurisdiction, rather than its mere existence. This, essentially, is the personal model of jurisdiction, discussed further below. Notable in this respect is the

¹⁷⁴ *Al-Saadoon*, High Court (n 114) [68]–[71].

¹⁷⁵ The freedom of the high seas is set out in UNCLOS art 87:

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States: (a) freedom of navigation; (b) freedom of overflight; (c) freedom to lay submarine cables and pipelines, subject to Part VI; (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI; (e) freedom of fishing, subject to the conditions laid down in section 2; (f) freedom of scientific research, subject to Parts VI and XIII.
2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

These broad freedoms are extended by art 58 to the EEZ, albeit subject to the specific provisions relating to the EEZ. Under art 78 the rights of a coastal State with respect to its continental shelf do not affect the character of the superjacent waters. Hence, there will be the same freedom of navigation as would apply were there no claim to the continental shelf. Under art 33, coastal States are permitted in the contiguous zone only to exercise the control necessary to prevent and punish specific types of infringements within its territory (i.e. internal waters or archipelagic waters) or territorial sea. UNCLOS (n 149) arts 33, 58, 78, 87.

ECtHR's decision in *Drieman and Others v Norway*, in which a number of Greenpeace protestors claimed that their interdiction and arrest while interfering with whaling in Norway's EEZ, along with their subsequent prosecution, violated their freedoms of assembly and expression.¹⁷⁶ The ECtHR ultimately judged Norway's conduct clearly to be within its margin of appreciation in applying the rights in question, and the application therefore to be inadmissible.¹⁷⁷ However, the Court did accept that the relevant freedoms were engaged, on the basis that the 'applicants' convictions and sentence[s]...were all measures which the respondent State had taken *in the exercise of its jurisdiction* in the sense of Article 1 of the Convention, and thus were capable of engaging its responsibility under the Convention.¹⁷⁸ For present purposes, what is significant here is that the ECtHR did not simply state that the ECHR applied throughout the Norwegian EEZ, as would be the case if it had considered Norway to be exercising effective control over the relevant maritime area, but rather premised its applicability on the basis that the Norwegian courts had *exercised* the jurisdiction granted it, over the individuals concerned, under the relevant provisions of UNCLOS.

Notwithstanding these issues, Geiß and Petrig tentatively propose two situations relevant to the conduct of MSOs in which a State may exercise effective control over an area of the oceans.¹⁷⁹ First, they suggest that a warship might exercise effective control within an 'operational radius', throughout which it is able to take enforcement measures, whether it takes those measures or not.¹⁸⁰ However, it is the actual exercise of control over an area that is relevant, rather than capability, that matters; even if a warship might be capable of exercising effective control over a certain area, it does not follow that it will inevitably do so. Even if a warship could, in theory, exercise effective control over a mobile operational radius, the recognition of this as an example of effective control of an area would be a novel development of the law, noting

¹⁷⁶ *Drieman and Others v Norway* (Admissibility) App no 33678/96 (ECtHR, 4 May 2000). The decision is not paginated or paragraph-numbered.

¹⁷⁷ *ibid*.

¹⁷⁸ *ibid* (emphasis added).

¹⁷⁹ Robin Geiß and Anna Petrig, *Piracy and Armed Robbery at Sea* (OUP 2011) 107–09. Notably, Geiß and Petrig were writing before the publication of the Grand Chamber's decision in *Al-Skeini*.

¹⁸⁰ *ibid* 108.

that the same argument could apply to other military units, or even individual soldiers. Consistent with the ECtHR's decision in *Drieman*, if it is the warship's actual enforcement activities on which its effective control over an area depends, then a court or treaty body is likely to examine the situation on the basis of the authority and control exercised by the ship over individuals by virtue of the particular activity.¹⁸¹

Second, Geiß and Petrig suggest that the cumulative control exerted by a number of warships, such as those engaged in counter-piracy activities in the Gulf of Aden around 2011, could be sufficient 'to cast a net of effective overall control', particularly within the Internationally Recommended Transit Corridor (IRTC).¹⁸² However, even in the IRTC, an area in which naval forces were concentrated to provide enhanced security for merchant shipping, it is hard to see how the assembled naval forces could be said to have exercised sufficient control to meet the required standard. Notwithstanding the significant naval presence, and their enforcement activities against pirates, they still respected the high seas freedoms of merchant shipping, as highlighted by the strictly advisory nature of the IRTC. Noting, again, the high standard applied in the land context, it seems unlikely that this could realistically have amounted to effective control over the relevant area for the purposes of the ECHR.

It is clear that effective control over an area is a valid basis for the extraterritorial application of the ECHR and arguably, by extension, the applicability of other IHRL treaties that depend on a jurisdictional link. Nevertheless, it is unlikely to be of great importance in the extraterritorial application of IHRL treaties to MSOs. Drawing on the practice of the ECtHR, the threshold for applicability on this basis is set higher than is likely often to be achieved in a maritime context. It might arguably be relevant in some very specific situations: the exercise by one State of effective control of the territorial waters of another, such as where the former assumes responsibility for the coast guard and other similar functions; within tightly delimited areas, such as safety zones; and, conceivably, where one State exercises effective control over a foreign-flagged vessel. However, even in these circumstances, there may be a more convincing basis

¹⁸¹ See below s 3.3.4.

¹⁸² Geiß and Petrig (n 179) 108. On the IRTC see *ibid* 17–18.

for the extraterritorial application of IHRL treaties arising from the exercise of State agent authority and control, discussed next.

3.3.4. Applicability arising from the exercise of State agent authority and control over individuals

As set out above, extraterritorial application of human rights treaties can arise according to a personal model of jurisdiction.¹⁸³ It has consistently been the basis on which both the ICCPR and ACHR have been applied extraterritorially and has featured increasingly in the jurisprudence of the ECtHR, not least in its judgment in *Al-Skeini*. While there is insufficient practice relating to the extraterritorial application of the ACHPR, its application on the basis of the personal model is a plausible future development. Of the IHRL treaties under consideration, it is only the CAT that does not appear to be capable of being applied on this basis, notwithstanding the view of the Committee Against Torture.¹⁸⁴

In broad terms, an individual will be subject to the jurisdiction of a State when that State exercises authority and control over him or her.¹⁸⁵ In such circumstances, only those rights relevant to the particular exercise of authority and control will be engaged. Given that MSOs involve the exercise of authority and control by State agents (i.e. coast guard or naval forces) over other users of the maritime domain, this basis of extraterritorial application is obviously of particular significance to the present enquiry. This is especially so in light of the difficulties set out above with respect to establishing extraterritorial applicability on the basis of effective control over an area at sea. However, while the principle is easily stated in outline, its detailed application to some concrete scenarios can be more complex and, in light of the remaining controversies discussed above, less than certain.

The key determination to be made is whether, at a particular stage in an MSO, an individual is under the authority and control of the State agents conducting the operation. Referring back to the stages of a generic MSO set out in Chapter

¹⁸³ See above s 3.2.2.

¹⁸⁴ See above s 3.2.1.4.

¹⁸⁵ See above s 3.2.2.

1,¹⁸⁶ both stages 6 and 7 clearly involve the detention of individuals by the interdicting State, on board the interdicted vessel and on the interdicting ship respectively. However, wherever detention takes place, detention is the least controversial situation in which a State can be argued to be exercising authority and control over individuals so as to give rise to extraterritorial application. Indeed, detention is the archetypical manifestation of State control over an individual, and the principle by which it engages the extraterritorial application of human rights treaties on land can be transposed directly to the maritime environment.

Extraterritorial applicability arising from detention is strongly supported by the limited ECHR jurisprudence on point. Although these cases relate directly only to the application of the ECHR, they are especially notable given the more restrictive approach to the personal model adopted by the ECtHR compared, in particular, to that of the IACHR. Most prominent is the decision in *Medvedyev and Others v France*, which concerned alleged breaches of Article 5 ECHR, the right to liberty and security of the person, in respect of the crew of a Cambodian-flagged vessel intercepted and boarded by French naval forces on the high seas.¹⁸⁷ The crew, suspected of involvement in drug trafficking, were detained on board their vessel while it was towed to France, where they were handed over to local police. Considering the question of extraterritorial applicability, the Grand Chamber determined that that the ECHR applied throughout this period.¹⁸⁸ Importantly, when this aspect of *Medvedyev* was considered, alongside other analogous cases, by the Grand Chamber in *Al-Skeini*, it concluded that jurisdiction did not arise ‘solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power over the person in question.’¹⁸⁹ Furthermore, in finding that the applicants in *Hirsi Jamaa* were within the jurisdiction of Italy, the Grand Chamber referred not only to *de jure* jurisdiction arising from the Italian flag of the ship to which they were transferred,¹⁹⁰ but also, relying on *Medvedyev*, to

¹⁸⁶ See above s 1.1.2.

¹⁸⁷ *Medvedyev* (n 2). For further discussion of the facts see below s 5.2.

¹⁸⁸ *Medvedyev* (n 2) [67].

¹⁸⁹ *Al-Skeini*, ECtHR (n 8) [136].

¹⁹⁰ See above s 3.3.1.

the *de facto* control exercised by the Italian forces over the individuals concerned.¹⁹¹

In subsequent cases concerning similar facts, the ECtHR has proceeded, without detailed scrutiny of the question of extraterritorial applicability, on the basis that the ECHR applies. In *Rigopoulos v Spain*, the ECtHR considered an alleged violation of Article 5(3) ECHR arising from the interdiction and boarding of a Panamanian-flagged vessel by Spanish customs officials on the high seas.¹⁹² The crew, comprising various nationalities, was detained in connection with suspected narcotics offences, while the interdicted vessel was escorted to a port in the Canary Islands. Although the Court ultimately found the Applicant's detention not to have been in breach of the requirement of promptness,¹⁹³ there is no suggestion of any doubt as to the applicability of the ECHR for the duration of the alleged detention. Similarly, in *Vassis and others v France*, the ECtHR considered another alleged violation of Article 5(3), in this case arising from the interdiction and boarding of a Panamanian-flagged vessel by French naval forces.¹⁹⁴ The crew, again suspected of narcotics offences, was detained under guard on board the interdicted vessel, which was diverted to Brest, where the crew was handed over to the public prosecutor. On this occasion the Court found there to have been a violation of Article 5(3);¹⁹⁵ and, again, there is no suggestion of doubt as to the applicability of the ECHR throughout the period of detention.

These cases confirm the unsurprising conclusion that the ECHR and, by extension, other human rights treaties, will apply to those detained at sea. While the cases considered by the ECtHR have concerned individuals detained in their own vessel, it is inconceivable that this would not also be the case where detainees are transferred to the interdicting ship, or another vessel, so long as they remain in detention.¹⁹⁶ However, less immediately clear is the degree of

¹⁹¹ *Hirsi Jamaa* (n 2) [79]–[81]. See also *Den Heijer* (n 152) 271–74.

¹⁹² *Rigopoulos v Spain* ECHR 1999-II 435. The decision is not paginated or paragraph-numbered. For further discussion of the facts see below s 5.2.

¹⁹³ *Rigopoulos* (n 192).

¹⁹⁴ *Vassis and Others v France* App No 62736/09 (ECtHR, 27 June 2013). For further discussion of the facts see below s 5.2.

¹⁹⁵ *Vassis* (n 194) [52]–[62].

¹⁹⁶ Noting that applicability may also arise in this situation on the basis of flag-State jurisdiction over the vessel to which detainees are transferred.

control required over detainees in order to meet the test of authority and control, in particular the degree of control that must be exerted over individuals while still on board their own vessel.

Informative in this regard is the decision in *Medvedyev*, in which the Applicants claimed to have been confined to their quarters throughout the voyage to France, while the French government claimed that these measures had been relaxed. Notwithstanding this disagreement, the Grand Chamber stated its opinion that:

while it is true that the applicants' movements prior to the boarding of the Winner were already confined to the physical boundaries of the ship, so that there was a *de facto* restriction on their freedom to come and go, it cannot be said, as the Government submitted, that the measures taken after the ship was boarded merely placed a restriction on their freedom of movement. The crew members were placed under the control of the French special forces and confined to their cabins during the voyage. True, the Government maintained that during the voyage the restrictions were relaxed. In the Court's view that does not alter the fact that the applicants were deprived of their liberty throughout the voyage as the ship's course was imposed by the French forces.

While the Grand Chamber was here considering the separate, but related, question of the point at which detention starts and ends,¹⁹⁷ it follows by necessary implication that it considered the ECHR to apply at least during the period of detention. Consequently, in assessing whether the test of State agent authority and control is met, it is necessary to consider not only that which is exercised over individuals' actions within a vessel, but also that which is exercised over the vessel as a whole. Indeed, when addressing directly the question of extraterritorial applicability, the Grand Chamber found that it arose as a result of the 'full and exclusive control over the [Cambodian ship] and its crew, at least *de facto*, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France'.¹⁹⁸

A similar conclusion was reached by the Committee Against Torture in *JHA v Spain*, which concerned the rescue by a Spanish vessel of a cargo vessel, the *Marine I*, which capsized in international waters while carrying 369 immigrants

¹⁹⁷ On this question see below s 5.4.3.

¹⁹⁸ *Medvedyev* (n 2) [67].

of various nationalities.¹⁹⁹ On reaching the stricken vessel, the Spanish tug placed it under tow, before anchoring with it off the coast of Mauritania while the Spanish authorities established a course of action for dealing with the immigrants.²⁰⁰ Notwithstanding the issues surrounding the extraterritorial applicability of CAT generally,²⁰¹ the Committee's interpretation of what it means to be within the jurisdiction of a State party is nevertheless informative. It recalled the statement in its General Comment 2,

that the jurisdiction of a State party refers to any territory in which it exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law. In particular, it considers that such jurisdiction must also include situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention.²⁰²

Applying this to the facts under consideration, the Committee 'observe[d] that the State party maintained control over the persons on board the *Marine I* from the time the vessel was rescued and throughout the identification and repatriation process',²⁰³ i.e. from the point the vessel was rescued until the individuals were transferred to land. Importantly, this was the case notwithstanding the individuals' location on the *Marine I*, and not the rescue vessel. Although the extent to which this automatically follows from General Comment 2 can be questioned, noting that document's reference to 'control over persons in detention', the Committee's understanding of what it means to be within the jurisdiction of a State party is consistent with that of the Grand Chamber in *Medvedyev*.

The decisions in both *Medvedyev* and *JHA v Spain* suggest that the State agent authority and control test can be met as a result of the *de facto* control exercised over a vessel as a whole, with no necessary requirement for the boarding party of an interdicting vessel to be physically present onboard or to exercise further control over particular individuals on board; what is important is

¹⁹⁹ *JHA v Spain* (n 76) para 2.1.

²⁰⁰ *ibid* para 2.2.

²⁰¹ See above s 3.2.1.4.

²⁰² *JHA v Spain* (n 76) para 8.2 (citation omitted). It is notable that General Comment 2 refers to the meaning of 'territory', rather than 'jurisdiction', though the conclusion is the same.

²⁰³ *Ibid* para 8.2

the degree of control that is being exercised, by whatever means. In particular, if the ship's course (and, by analogy, its speed), are being imposed by the interdicting ship, then this would seem to be sufficient. Such a result is arguably consistent with the broader concept underlying the personal model of jurisdiction, premised on *de facto*, rather than formalistic, manifestations of control, as it applies across other human rights treaties, in particular the ICCPR and ACHR.²⁰⁴ Therefore, while the decisions are of direct relevance only within their own respective systems, they represent a plausible guide to the application of the other instruments.

Applying these conclusions to the stages of a generic MSO, not only will human rights treaties apply in stages 6 and 7, in which the crew of an interdicted vessel is detained subsequent to the vessel being boarded, but potentially where it exercises control over the interdicted vessel earlier in the operation, i.e. at stage 5, at which point it is complying with the interdicting ship's instructions, or potentially earlier, if the vessel is immediately cooperative. Where the authority and control test is met in this manner, it follows that other relevant rights, in addition to those related to deprivation of liberty, may also be engaged. While it is true that the applicable rights may be divided and tailored to the circumstances, meaning that the full catalogue of rights protected by a particular instrument will not necessarily apply, this would not prevent the protection of, for example, the right to life with respect to the use of force against a detained crew.

However, an important question this leaves unanswered is whether the State agent authority and control test is met when the interdicted vessel is *not* following the directions of the interdicting ship, particularly when the interdicting ship uses force in order to compel compliance. This would be the case at stage 3, at which the interdicting ship may use force to comply with its instructions (for example to stop or change course and speed), or at stage 4, when it sends a boarding team, which may use force if the crew of the interdicted vessel does not cooperate with the boarding. On this point, the decision in *Medvedyev* provides little guidance, given that, while the Grand Chamber implied that the

²⁰⁴ See above s 3.2.2.

ECHR had applied from the point of ‘interception’,²⁰⁵ it did not state when it considered the interception to have occurred, or whether there might be any additional basis for the ECHR applying *before* the interception. Therefore, while the decision records that the interdicting French vessel had used force to compel compliance with its instructions,²⁰⁶ it is unclear whether the Court considered, or would have considered, the ECHR to have applied at that point in the operation. This is not particularly surprising; given that the Grand Chamber was concerned only with alleged breaches of Article 5, it was strictly necessary only to establish whether the ECHR applied throughout the period of alleged detention, and not before. Furthermore, the same arises with respect to the Committee Against Torture’s decision in *JHA v Spain*, in which it considered the CAT to apply from the point that the *Marine I* ‘was rescued’.

In the absence of specific guidance from courts and treaty bodies as to whether and when force used in the course of MSOs is capable of meeting the threshold of State agent authority and control, it is necessary to consider the law more generally. However, as set out above, while a sound argument can be constructed that, as a matter of principle, it is unsustainable to limit the personal model to only certain types of control (i.e. detention, but not the use of physical force), of the instruments under consideration, it is only in the ECtHR’s application of the ECHR and IACHR’s application of the ACHR that the limits of the personal model have come under detailed scrutiny.²⁰⁷ Furthermore, practice on this issue with respect to those two instruments has diverged, and the relevant jurisprudence under the ECHR is particularly complex.

Summarising, briefly, the position with respect to the extraterritorial application of the ACHR, the IACHR has relied upon a broad conception of State agent authority and control, finding essentially any conduct attributable to a State, that results in the violation of rights, to be sufficient. Moreover, it has consistently applied this principle in connection with the use of physical force, where it has been used by a State both against aircraft in international airspace and against

²⁰⁵ *Medvedyev* (n 1) [67].

²⁰⁶ *Ibid* [13] (‘After several warnings and warning shots fired under orders from France’s maritime prefect for the Atlantic went unheeded, the French frigate fired a shot directly at the *Winner*.’).

²⁰⁷ See above s 3.2.2.

individuals present in another State's territory.²⁰⁸ In light of this consistent practice, albeit outside of the maritime context, it is inconceivable that the IACHR would not consider the ACHR to be applicable to the extraterritorial use of force by State agents conducting MSOs.

However, the extraterritorial application of the ECHR on this basis is far more controversial. In particular, as set out above,²⁰⁹ the ECtHR's failure to overrule key elements of *Banković*, reflected in the Grand Chamber's reference in *Al-Skeini* to the exercise of 'public powers' as the context against which the ECHR was found in that case to apply extraterritorially, arguably prevent the application of the ECHR on the basis of physical force alone, however unprincipled that result may be. Nevertheless, the context in which force is used in the course of MSOs can arguably be distinguished from the situations such as that in *Banković*, resembling more closely the use of force in *Al-Skeini* in the exercise of public powers.

Force during maritime security operations is generally used pursuant to a claimed legal right to do so, for example under UNCLOS, as an exception to exclusive flag State jurisdiction. Article 110 UNCLOS provides for the right of warships and 'other duly authorized ships' to board any vessel that falls within specific enumerated circumstances, including those where there are reasonable grounds for suspecting that the vessel is engaged in piracy or the slave trade.²¹⁰ Other exceptions to exclusive flag State jurisdiction can be established by treaty permitting, in particular circumstances, the boarding by agents of one

²⁰⁸ See above s 3.2.2.

²⁰⁹ See above s 3.2.2.

²¹⁰ Art 110(1) reads in full:

Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that: (a) the ship is engaged in piracy; (b) the ship is engaged in the slave trade; (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109; (d) the ship is without nationality; or (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

UNCLOS (n 149) art 110(1).

State of vessels flagged to another.²¹¹ The use of force pursuant to such provisions is analogous to the basis on which the Grand Chamber established the applicants to be within the jurisdiction of the UK on the facts of *Al-Skeini*. In that case it was in the context of the exercise of public powers—i.e. pursuant to the UK’s responsibility for security—that the use of force was found to engage the ECHR. Similarly, in the context of MSOs, force will generally be used against vessels and individuals over whom a State will at least claim to have some sort of authority or responsibility, either under the law of the sea or some other agreement. Whether or not such a claimed basis is genuine, this is quite different from *Banković* where the only link, claimed or otherwise, between the States involved and those injured in the bombing attack was the conduct of the attack itself.

Admittedly, in *Al-Skeini*, the UK forces in question were exercising public powers in place of territorial authorities that had been displaced through occupation. If construed very narrowly, it is clearly possible to distinguish this from the situation as it pertains to force used in the course of MSOs. However, it is submitted that the proposed line of reasoning, while untested, represents a plausible basis for the extraterritorial application of the ECHR to all instances of the use of force in the course of MSOs. Most persuasively, it avoids the result of imposing an artificial limit on the application of the personal model, while remaining consistent with the decisions in both *Al-Skeini* and *Banković*.

More generally, the extraterritorial application of human rights treaties arising from the use of physical force alone clearly remains unsettled. The IACHR’s interpretation of the ACHR aside, it remains to a degree speculative with respect to each of the other instruments, as well as for the future interpretation of the ACHR by the IACtHR, either because of lack of practice or, in the case of the ECHR, because of complications in the related jurisprudence. Nevertheless, the arguments in favour of such application clearly demonstrate that future application of relevant human rights instruments on this basis should, at the very least, be considered a realistic possibility.

²¹¹ This is the case, for example, with respect to the many bilateral agreements concluded by the United States to permit the boarding of foreign vessels on the high seas—or in a foreign State’s territorial sea—where that vessel is suspected of involvement in the narcotics trade. Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (CUP 2009) 89–94.

3.4. Conclusion

The situation with respect to extraterritorial applicability of IHRL treaties is complex, with divergence in law and practice between the treaties under consideration. The CAT remains an exceptional case, in relation to which the broad scope of application claimed by the Committee Against Torture with respect to some provisions remains difficult to justify in light of the obvious textual challenges. In contrast, while the extraterritorial applicability of the ICCPR remains controversial, the most persuasive view is that, like the ECHR and ACHR, it is capable of extraterritorial application, and that this depends primarily on the concept of jurisdiction. Similarly, while the ACHPR is silent on the subject, and is supported by very little practice, it is plausible that it, too, will be applied extraterritorially with reference to the concept of jurisdiction. In this context, this can include instances of *de jure* jurisdiction, but also refers more widely to situations of *de facto* authority and control. These can include both the effective control over an area, particularly in the practice relating to the ECHR, or from the exercise by State agents of *de facto* authority and control over individuals.

Applying these principles to MSOs, the extraterritorial application of IHRL treaties can arise under a range of circumstances. Although more recent practice has often focused on *de facto* authority and control, flag-State jurisdiction, a classic example of *de jure* extraterritorial jurisdiction, is of continued relevance, having been applied by the ECtHR and constituting an express basis for the extraterritorial application of Article 5 of the CAT. Turning to *de facto* authority and control, it is conceivable that extraterritorial applicability could arise, in certain narrow circumstances, from effective control over an area. However, more significant, though less likely to be relevant to application of the CAT, is the concept of State agent authority and control, which this chapter has argued is capable of applying to many of the activities that comprise MSOs.

The divergence in practice relating to State agent authority and control, particularly between the ECHR and ACHR, admittedly complicates the situation to a certain extent. The practice of the IACHR would suggest that it would apply the ACHR to any activity capable of infringing the rights that it protects. Hence it

would apply not only to, for example, situations of detention, but also to the use of force alone. In contrast, the ECtHR has applied the ECHR more restrictively; while it is settled that detention would suffice, it is less clear whether this would be the case at the stage of an MSO where the use of force is the only form of authority or control being asserted. However, even in this situation, the use of force in the course of MSOs is likely to be premised on the exercise of some kind of claimed authority such that a sound argument can be made to distinguish it from situations where the ECHR has been held not to apply. On this basis, it follows that arguments can plausibly be made that both the ECHR and ACHR will apply to most, if not all, of the activity comprising an MSO that is potentially capable of infringing rights protected by each instrument. While practice is less developed with respect to the ICCPR and ACHPR, it is arguably likely that they will be applied at least as broadly as the ECHR, noting the ECtHR's relatively conservative approach to that instrument.

In sum, when a State that is party to one of the treaties under consideration conducts MSOs outside its territory, either the MSO as a whole, or certain of the activities of which it is composed, are likely to engage human rights treaty obligations. As noted above, a State's obligations under the CAT present a special case, being subject to a range of very specific applicability provisions. However, for the rest of the treaties, it is likely that a basis for their application will be identifiable, though uncertainties and differences certainly do persist. The broadest basis for extraterritorial application, the exercise of State agent authority and control, is the least certain in its scope; however, it is submitted that this provides a plausible basis for applying each of the treaties under consideration (with the likely exception of the CAT) to any activity comprising an MSO that is capable of engaging a State's obligations under the treaty in question.

4. Use of Force

4.1. Introduction

This chapter examines the first of the substantive aspects of maritime security operations (MSOs) to be considered in this thesis—the use of force. The contemplation, at least, that force may be used in the course of MSOs is implicit in the provisions of the law of the sea (and elsewhere) that provide the basis in law for their execution.¹ Indeed, the ability to effect an interdiction, i.e. to stop, board and search a vessel, as well as potentially to arrest those on board and seize their cargo, depends on the ability to use force if the interdicted vessel does not cooperate.

However, the use of force by State agents presents a paradigmatic example of circumstances in which a State's activities are likely to engage human rights obligations. Where the State uses force, it has the potential to interfere with the most fundamental of rights, the right to life, as well as others protecting both individuals and their property, and, as a result, is subject to a well-developed regime of protection. The right to life, in particular, entails both positive and negative obligations, including not only the obligation not to deprive a person arbitrarily of their life, but to take steps to protect life and to ensure accountability when it is taken unlawfully.

The analysis will proceed from the argument in the previous chapter that human rights obligations are engaged in the course of MSOs at least from the point that force is first used, even where they are conducted extraterritorially.² As explained in Chapter Three, this remains a controversial proposition. While the weight of opinion is on the side of recognising the application of human rights law at least at some point during the course of an interdiction, there remain States that deny any extraterritorial application at all. The assertions made in this and subsequent chapters must therefore be understood to be qualified by this important caveat.

This chapter will begin by describing current practice in the use of force in MSOs, examining both doctrine and the relevant literature to explain the range

¹ On the bases for, and regulation of MSOs, generally, see above s 1.1.3.

² See above s 3.3.4.

of means and methods employed. It will then briefly set out the parameters for the use of force recognised in the law of the sea. These have developed largely through case law and have been influenced, it seems, by human rights norms. The purpose of this analysis is to provide the comparator for the subsequent examination of relevant obligations under international human rights law (IHRL).

The analysis of IHRL begins by setting out the main rights likely to be engaged when force is used in the course of MSOs, examining those that protect individuals, as well as those that protect their property. It then proceeds to analyse, in detail, the obligations that have been established in the jurisprudence of the IHRL systems under consideration with respect to law-enforcement operations, and the applications of the relevant principles to MSOs. In so doing, it focuses on the right to life as the key right that is likely to be engaged and the right in respect of which there is the best developed practice. These obligations refer not only to the execution of MSOs, but also to their authorisation and regulation in law; their planning and resourcing; the training of relevant personnel; and obligations following the execution of MSOs to render medical aid, inform relatives of those injured, and to conduct investigations and hold those responsible for violations to account. This analysis reveals that, while the law of the sea is at least consistent with IHRL norms concerning the execution of MSOs, the obligations under IHRL run much deeper, albeit potentially limited by the issues concerning their extraterritorial applicability set out in Chapter Three.

4.2. Practice concerning the use of force in MSOs

Before considering the application of either the law of the sea or IHRL to the use of force in MSOs, it is helpful first to outline how such force is applied in practice. The short account that follows focuses on force used specifically in the course of boarding operations, because, as noted in Chapter One, such operations are especially prominent amongst MSOs and, by nature, particularly likely to involve the use of force. Nevertheless, force may also be used where there is no intention or desire to board another vessel. Indeed, many of the forceful measures described below could be used in other situations in which State authorities wish to compel or persuade a vessel to behave in some

desired manner, for example to desist from a certain activity, or to leave a particular area.

As noted elsewhere in this thesis, official publications setting out, in detail, how MSOs are executed are usually classified or retained for official use only. The following draws significantly on Dutch doctrine, which is one of the few such accounts publicly available, as well as a limited range of published NATO and US documentation. It also draws upon practice reported in the literature, usually based upon either first-hand experience or knowledge of the relevant government documents. The intention is not to focus on the practice of one particular State, or subsequently to assess its lawfulness, but rather to provide the general context for the subsequent analysis of the law.

Although MSOs are not necessarily violent, force may be used at various stages throughout the course of their execution. The type and degree of force used will depend on the level of cooperation received from the interdicted vessel. While the terminology used to describe the different situations can vary, the principles are broadly the same and Dutch doctrine is illustrative. Considering, specifically, boarding operations, it defines an ‘unopposed boarding’ as one ‘in which the master of the ship follows instructions from the naval ship and in which no passive or active resistance is apparent or expected.’³ A ‘non-cooperative boarding’ is one ‘in which the ship refuses to cooperate but in which no active or armed resistance is expected. The resistance is of a passive nature, for instance refusal to answer questions, refusal to follow instructions or the presence of passive measures on board that obstruct or hamper the boarding or searching of the vessel.’⁴ Finally, an ‘opposed boarding’ is one ‘in which the master deliberately refuses to cooperate, in which active or armed resistance is expected or in which measures are in place that are clearly intended to pose a danger to or to injure members of the boarding party.’⁵

³ Royal Netherlands Navy, ‘Fundamentals of Maritime Operations: Netherlands Maritime Military Doctrine’ (2014) (Netherlands Maritime Military Doctrine) 349. As noted at the reference, this may also be referred to as a ‘compliant boarding’ or ‘cooperative boarding’.

⁴ *ibid* 349. As noted at the reference, this may also be referred to as a ‘non-compliant boarding’. *ibid* fn 386.

⁵ *ibid* 350.

To achieve either a non-cooperative or opposed boarding, it may be necessary to use force. With respect to a non-cooperative boarding, force may be used ‘to persuade the ship to cooperate’ and will cease ‘[a]s soon as cooperation has been obtained.’⁶ It goes on state, ‘If necessary, force will be used in the form of warning shots across the bow, non-disabling fire on non-vital parts of the ship (such as mast, funnel or cargo), or ultimately disabling fire on vital parts of the ship (propulsion, rudder, buoyancy).’⁷

Dutch doctrine is broadly representative of wider practice with respect to the use of force for this purpose. The terms ‘non-disabling fire’ and ‘disabling fire’ are both terms of art in NATO doctrine. The former is defined as, ‘Fire directed at a non-vital part of a vessel so as not to impair its seaworthiness and manoeuvrability’,⁸ while the latter is, ‘Fire directed at a vessel so as to impair its manoeuvrability but not its seaworthiness.’⁹ Although, according to these definitions, neither type of fire is intended to affect the seaworthiness of an interdicted vessel, this presumes a narrow definition of seaworthiness, given that a vessel subjected to disabling fire will be impaired in its manoeuvrability (i.e. its propulsion and ability to change and maintain course), or, according to Dutch doctrine, its buoyancy.

US doctrine is broadly similar, though does not refer explicitly to non-disabling fire. The Commander’s Handbook on the Law of Naval Operations refers in general terms to oral warnings, warning shots and disabling fire. The latter is defined as ‘firing under controlled conditions into a noncompliant vessel’s rudder or propulsion equipment for the sole purpose of stopping it after oral warnings (if practicable) or warning shots (if practicable) have gone unheeded.’¹⁰

As noted above, official documents containing more detailed accounts of the procedures used to apply force in MSOs are not generally made available to the public. However, within the academic literature on the subject, US Coast Guard

⁶ *ibid* 351–52.

⁷ *ibid*.

⁸ NATO, ‘Glossary of Terms and Definitions’ (AAP-06, 2016) 95.

⁹ *ibid* 44.

¹⁰ US Navy, US Marine Corps, US Coast Guard, ‘The Commander’s Handbook on the Law of Naval Operations’ (NWP 1-14M, MCTP 11-10B, COMDTPUB P5800.7A, August 2017) para 3.11.5.1.

and US Navy doctrine is reported to prescribe a 'progressive sequence' of measures to enforce an order to permit boarding against a non-compliant vessel.¹¹ The Coast Guard approach, for example, requires a progression from 'command presence', through "low-level" and then "higher-level" tactics', ultimately to disabling fire.¹² According to Allen:

A variety of low-level force tactics designed to compel a fleeing vessel to stop have been tried over the years, including low level passes by aircraft; physically blocking or even "shouldering" the fleeing vessel; directing fire hose streams into the fleeing vessel's exhaust stack to flood the engine; deploying nets, lines and other devices designed to entangle the vessel's propellers; and severing the vessel's fuel line.¹³

If such tactics fail, as Allen suggests will be likely in the case of 'a determined noncompliant suspect', then they can be followed with warning shots and, ultimately, disabling fire.¹⁴

Disabling fire can, itself, be achieved with a range of means and methods. Allen describes US practice as involving a progressive escalation of means, requiring initially the use of 'smaller calibre weapons', for example a .50 calibre gun, before proceeding, if necessary, to employ the ship's main armament.¹⁵ Furthermore, disabling fire (and other lesser forceful measures) can be employed from platforms other than the interdicting ship itself, including, most notably, helicopters. From these, precision weapons can be employed effectively by marksmen against fast-moving or highly manoeuvrable vessels.¹⁶ Indeed, these tactics have been considered essential to facilitate the interdiction of such targets.¹⁷

After the vessel has been prepared, the boarding itself will begin with the insertion of a security team, to ensure the safety of the rest of the boarding party. Once the vessel is secure, the remaining members of the team, including

¹¹ Craig H Allen, 'Limits on the Use of Force in Maritime Operations in Support of WMD Counter-Proliferation Initiatives' (2006) 81 Intl L Studies 77, 100.

¹² *ibid* 100.

¹³ *ibid* 101.

¹⁴ *ibid* 101.

¹⁵ *ibid* 105.

¹⁶ See, for example, Rachel Canty, 'Developing Use of Force Doctrine: A Legal Case Study of the Coast Guard's Airborne Use of Force' (2000) 31 U Miami Inter-American L Rev 357, 369–71.

¹⁷ *ibid* 364.

those tasked with inspecting documentation or searching for any suspected illicit cargoes, will embark.¹⁸ The subsequent activities of the boarding party will depend on the aim of the boarding, but may involve the ancillary use of force, for example to arrest individuals or to conduct a search that entails causing damage to the vessel.¹⁹

Turning to opposed boardings, Allen's description of US doctrine suggests that the tactics set out above can be used to assist in the execution of these as well.²⁰ This makes sense; even if disabling fire fails to persuade a vessel to cooperate, it may still make it easier to conduct a subsequent boarding by affecting the vessel's manoeuvrability. However, Allen also suggests that a 'vertical take-down', involving the insertion of special operations forces by helicopter to take control of the vessel, may be an 'effective alternative means of overcoming the suspect vessel's noncompliance or even opposition—often without endangering the crew or potentially dangerous cargo on the suspect vessel'.²¹ Similarly, Dutch doctrine suggests that opposed boardings will *only* be conducted by means of a 'takedown operation', usually with an element of surprise, to gain control of the vessel.²² NATO doctrine defines such an operation as, 'The insertion of specially trained forces onto a vessel to compel the master to submit to a search by a boarding party.'²³ However, although Dutch doctrine states that 'there is no question of preparing the target ship',²⁴ this may not always be the case. While, as Allen notes, 'A vertical take-down may obviate the need for disabling fire',²⁵ this may not be the case where disabling fire is necessary, or helpful, as a measure to stop or slow the interdicted vessel. The situation is therefore more nuanced than the Dutch doctrine suggests—a range of forceful measures may be available, each carrying advantages or disadvantages in the particular circumstances. In any case, once the vessel has been secured, the operation can continue, as for

¹⁸ Netherlands Maritime Military Doctrine (n 3) 352.

¹⁹ Allen (n 11) 106–08.

²⁰ *ibid* 104

²¹ *ibid* 105

²² Netherlands Maritime Military Doctrine (n 3) 352.

²³ AAP-06 (n 8) 134.

²⁴ Netherlands Maritime Military Doctrine (n 3) 352.

²⁵ Allen (n 11) 105.

other types of boarding, with the embarkation of a boarding party tasked with, for example, searching for illegal cargo.

Throughout the execution of MSOs, either the interdicting ship or individual members of a boarding or takedown team may use force in self-defence. The contours and parameters of this basis for the use of force will depend on the law (and, possibly, policy) of the State concerned, but Dutch doctrine is representative in referring to an inherent right of both individuals and military units (e.g. ships) to use force in self-defence, in the latter instance exercised under the authority of the unit's commanding officer.²⁶ In any case, however, this is distinct from the use of force, including disabling fire, to persuade the interdicted vessel to comply with the interdicting ship's instructions and prepare it for boarding, as well as from the use of force to arrest individuals or conduct a search.²⁷

A related, but more general, distinction should be drawn according to the intended lethality of force used in MSOs. NATO defines lethal force as that which is 'intended or likely to cause death, or serious injury resulting in death.'²⁸ Non-lethal force, by necessary implication, is that which is neither intended, nor likely, to cause death or serious injury resulting in death. It is uncontroversial that lethal (or deadly, as it is sometimes termed) force may, in some circumstances, be used in self-defence.²⁹ However, outside self-defence, force in MSOs is usually used on the basis that it is not lethal.³⁰ Indeed, warning shots are often considered to be signals, rather than a use of force at all.³¹ The other escalatory measures set out above, up to and including disabling fire, while undoubtedly forceful, are, by definition, not *intended* to cause death (or serious injury resulting in death), although whether they are *likely* to do so depends on the particular circumstances.

²⁶ Netherlands Maritime Military Doctrine (n 3) 225. See also Allen (n 11) 108–10.

²⁷ Allen (n 11) 108–10.

²⁸ AAP-06 (n 8) 80.

²⁹ See, for example, Allen (n 11) 86.

³⁰ With respect to US practice, see, for example, Canty (n 16) 367–68.

³¹ *ibid* 366–67. The US position set out by Canty is consistent with the decision of the International Tribunal on the Law of the Sea (ITLOS) in *M/V 'Saiga' (No 2)*. *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* (Merits, Judgment of 1 July 1999) ITLOS Reports [156].

4.3. The use of force in MSOs in the law of the sea

While the UN Convention on the Law of the Sea (UNCLOS)³² does not itself set explicit parameters for the use of force, relevant rules can be found in both treaty and customary law.³³ Most notably, the International Tribunal for the Law of the Sea (ITLOS) considered the use of force in the course of interdiction in *MV 'Saiga' (No. 2)*.³⁴ Noting UNCLOS's silence on the matter, the Tribunal found that general international law

requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.³⁵

The Tribunal went on briefly to state the practice from which it inferred its broad statements of principle:

These principles have been followed over the years in law enforcement operations at sea. The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered...³⁶

Applying these principles to the facts in *MV 'Saiga' (No. 2)*, the Tribunal noted that the *Saiga* was moving slowly and could have been 'boarded without much difficulty'. In any case, there was 'no excuse' for firing 'at the ship itself with live ammunition from a fast-moving patrol boat without issuing any of the signals

³² United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS).

³³ See, for example, Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (CUP 2009) 265–94; Efthymios Papastavridis, *Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Hart 2013) 50–82.

³⁴ *M/V 'Saiga' (No 2)* (n 31). The case concerned the use of force by a Guinean government patrol boat in the course of the 1997 interdiction of the *Saiga*, an oil tanker provisionally registered in Saint Vincent and the Grenadines, while the *Saiga* was in the Guinean EEZ. The *Saiga* was alleged by Guinea to be delivering fuel to fishing vessels in violation of Guinean customs law. The question of the degree of force used was just one of several issues that were engaged. The factual background is set out at *ibid* [31]–[39].

³⁵ *ibid* [155].

³⁶ *ibid* [156].

and warnings required by international law and practice.³⁷ The Tribunal also found the use of force on board the *Saiga* to have been excessive, specifically when, '[h]aving boarded the ship without resistance, [with] no evidence of the use or threat of force from the crew, [the officers] fired indiscriminately while on the deck and used gunfire to stop the engine of the ship.'³⁸

The Tribunal identified the relevant principles in part from two arbitral decisions dealing with similar issues. In the *I'm Alone* case,³⁹ an arbitral panel considered that an interdiction pursuant to the bilateral agreement in question might involve

necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel; and if sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purpose, the pursuing vessel might be entirely blameless.⁴⁰

Similarly, in the *Red Crusader* case,⁴¹ the Commission of Enquiry established to investigate the use of force against a British trawler attempting to escape the

³⁷ *ibid* [157].

³⁸ *ibid* [158].

³⁹ *SS 'I'm Alone' (Canada, United States of America)* (Joint Final Report of the Commissioners, 5 January, 1935) 3 Reports of International Arbitral Awards 1609. The arbitral award does not give the facts; however, the report in the American Journal of International Law states:

The *I'm Alone*, a British ship of Canadian registry, but de facto owned, controlled and managed by a group of American citizens engaged in smuggling liquor into the United States, was sunk on the high seas in the Gulf of Mexico by a United States coast guard patrol boat, with the loss of one member of the *I'm Alone's* crew, on March 22, 1929, after a hot pursuit which began on March 20 within twelve miles of the United States coast.

'Claim of the British Ship "I'm Alone" v United States' (1935) 29(2) AJIL 326, 326. The case considered a number of questions, including, '...whether, in the circumstances, the Government of the United States was legally justified in sinking the *I'm Alone*.' *ibid* 1615.

⁴⁰ *ibid*.

⁴¹ Investigation of Certain Incidents Affecting the British Trawler *Red Crusader* (Report of 23 March 1962 of the Commission of Enquiry established by the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Denmark on 15 November 1961) 29 Reports of International Arbitral Awards 523. The case concerned the 1961 interdiction of the British trawler, *Red Crusader*, by a Danish vessel. Having been arrested, and initially cooperated, the *Red Crusader* attempted to escape, in response to

Danish authorities, found that the interdicting vessel had 'exceeded legitimate use of armed force' in two ways. First, the interdicting vessel had fired solid gun-shot (intended as warning shots rather than to hit the trawler) without warning. Second, it had it had 'creat[ed] danger to human life on board the [trawler] without proved necessity' when it later used 'effective' fire on the trawler (i.e. solid gun-shot that impacted on the trawler's masts and hull). The Commission concluded on this point 'that other means should have been attempted...'.⁴²

The Tribunal in *MV 'Saiga' (No. 2)* also recognised the reaffirmation of '[t]he basic principle concerning the use of force in the arrest of a ship at sea' in the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (FSA).⁴³ Under the FSA, States shall ensure that their inspectors 'avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required in the circumstances.'⁴⁴

Almost identical language to that in the FSA was subsequently inserted into the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) by the 2005 Protocol.⁴⁵ SUA, as amended by its Protocol, goes further by setting out particular safeguards, including that States shall:

which the accompanying Danish vessel used force in an attempt to compel it to comply with its orders. *ibid* 526–39.

⁴² *ibid* 538.

⁴³ *M/V 'Saiga' (No 2)* (n 31) [156].

⁴⁴ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (concluded 4 August 1995, entered into force 11 December 2001) 2167 UNTS 3 art 22(1)(f) (FSA).

⁴⁵ As inserted by the 2005 Protocol, art 8*bis* (9) SUA states that:

the use of force shall be avoided except when necessary to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorized actions. Any use of force pursuant to this article shall not exceed

- (i) take due account of the need not to endanger the safety of life at sea;
- (ii) ensure that all persons on board are treated in a manner which preserves their basic human dignity, and in compliance with the applicable provisions of international law, including international human rights law;
- (iii) ensure that a boarding and search pursuant to this article shall be conducted in accordance with applicable international law;
- (iv) take due account of the safety and security of the ship and its cargo;...⁴⁶

More detailed provisions concerning the use of force can be found in numerous bilateral and multilateral agreements that authorise or establish a framework for the interdiction of one State's flagged vessels by those of another. For example, the 2003 Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area (Caribbean Area Agreement) sets out the following:

1. Force may only be used if no other feasible means of resolving the situation can be applied.
2. Any force used shall be proportional to the objective for which it is employed.
3. All use of force pursuant to this Agreement shall in all cases be the minimum reasonably necessary under the circumstances.
4. A warning shall be issued prior to any use of force except when force is used in self-defence.
5. In the event that the use of force is authorised and necessary in the waters of a Party, law enforcement officials shall respect the laws of that Party.

the minimum degree of force which is necessary and reasonable in the circumstances.

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (concluded 10 March 1988, entered into force 1 March 1992) 1678 UNTS 201 as amended by the Protocol of 2005 (adopted 1 November 2005, entered into force 28 July 2010) IMO Doc LEG/CONF.15/21 (SUA).

⁴⁶ *ibid* art 8*bis* (10).

6. In the event that the use of force is authorised and necessary during a boarding and search seaward of the territorial sea of any Party, the law enforcement officials shall comply with their domestic laws and procedures and the directions of the flag State.
7. The discharge of firearms against or on a suspect vessel shall be reported as soon as practicable to the flag State Party.
8. Parties shall not use force against civil aircraft in flight.
9. The use of force in reprisal or as punishment is prohibited.
10. Nothing in this agreement shall impair the exercise of the inherent right of self-defence by law enforcement or other officials of any Party.⁴⁷

SUA, the Caribbean Area Agreement, and other bilateral and multilateral agreements apply, as a matter of law, only to the particular operations they authorise or govern. However, they, like the FSA, can be considered to reaffirm the principles set out in the *M/V Saiga (No. 2)* judgment, namely that force used in the course of interdiction must be necessary, reasonable and proportionate. Furthermore, where force is used it must generally follow a process of escalation including, most importantly, the giving of warnings (including warning shots).

Importantly, these principles seem to apply both to the use of force in order to compel a vessel to stop and submit to boarding, as well as to the use of force once officers are on board the interdicted vessel. This can be seen in the reasoning of the ITLOS in its *M/V Saiga (No. 2)* judgment. As Guilfoyle notes, the Tribunal's reliance on the FSA as a reaffirmation of an existing principle 'was an interesting elision, as the [*I'm Alone* and *Red Crusader* cases] dealt only with use of force *against* a vessel while the FSA deals with the use of force *aboard* a vessel.'⁴⁸ The Tribunal seems to have made the (unstated) assumption that the same underlying law governs both phases of an operation. This makes sense, given that the law of the sea authorises both arrest and searching of vessels. While these are distinct authorizations, it would be

⁴⁷ Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area (concluded 10 April 2003, not yet in force) art 22 (Caribbean Area Agreement).

⁴⁸ Guilfoyle (n 33) 277.

surprising if the basic principles governing the use of force differed between the two. Consistent with this reasoning, it is clear that the provisions set out in the Caribbean Area Agreement are intended to apply to both phases, noting, in particular, Article 22(7), which requires the reporting to the flag State of '[t]he discharge of firearms *against or on* a suspect vessel'.⁴⁹

It is clear, therefore, that the law of the sea, as interpreted by the ITLOS in light of principles derived from general international law, already contains important rules and principles governing the use of force in MSOs. As will be shown, these reflect, or are at least consistent with, some relevant human rights norms, an observation arguably reflected in the reference in *M/V Saiga (No. 2)* to '[c]onsiderations of humanity',⁵⁰ though acknowledging the range of meanings that that term could be used to denote. This raises a question as to the extent to which human rights norms might have already been incorporated into the law of the sea. While the *I'm Alone* case demonstrates that at least some of these principles were recognised before the drafting of the major international human rights treaties, the law of the sea has continued to develop alongside human rights law and it seems likely, at the very least, that human rights law has influenced the development of the law of the sea in this area. Importantly, where human rights norms *have* been incorporated as part of the law of the sea, they apply throughout the maritime domain, thus avoiding the debate concerning the extraterritorial application of human rights law set out in Chapter Three.

Although the law of the sea provides important restraints on the use of force in the course of MSOs, it is, however, limited in its scope. The relevant principles are largely negative, prohibiting force that is unnecessary, unreasonable or disproportionate. While there are also some positive obligations—the requirement to give warnings before the use of force, for example—these are arguably just manifestations of the principle of necessity. More fundamentally, these principles apply only at the point that force is used, or at least contemplated. They are not, therefore, concerned with the wider circumstances in which force is used in MSOs, such as its basis in law, the planning and

⁴⁹ Caribbean Area Agreement (n 47) art 22(7).

⁵⁰ *M/V 'Saiga' (No 2)* (n 31) [155].

resourcing of the operation in which it is used, or its aftermath.⁵¹ As will be shown, IHRL rules extend the regulation of the use of force beyond the application of force itself to include these broader issues. Therefore, even though it is arguable that the law of the sea already incorporates some core human rights norms, the full range of obligations that can be identified in IHRL is much broader.

4.4. The application of IHRL to the use of force in MSOs

Having considered the limits placed on the use of force under the law of the sea, the chapter now turns to an analysis of the IHRL provisions that may be engaged when force is used in the course of MSOs. The section is in two parts: first, an examination of the relevant rights; and, second, a detailed examination of how they apply to MSOs, focusing, in particular on the right to life.

The premise of this analysis is that the rights in question apply to force used at any stage of a MSO, wherever the operation might be conducted. However, as discussed in detail in Chapters Two and Three, the applicability of IHRL, particularly extraterritorially, remains in many respects controversial. This is especially so where the only connection between an interdicting ship and an interdicted vessel is the force that is used by the former against the latter. Although an argument was presented in Chapter Three according to which each of the instruments under examination can be considered to apply in such situations,⁵² this is far from settled. It is especially controversial with respect to the ECHR. As noted in the introduction to this chapter, the following analysis should therefore be understood with this important caveat in mind.

4.4.1. Relevant rights

4.4.1.1. Rights protecting property

The account of the use of force in the course of MSOs set out above demonstrated that property damage may be caused in a number of situations, either deliberately or inadvertently. For example, damage will be inflicted

⁵¹ Noting, as a narrow exception, the requirement under the Caribbean Area Agreement to notify the flag State when weapons have been discharged. Caribbean Area Agreement (n 47) art 22(7).

⁵² See above s 3.3.4.

intentionally to a vessel when it is subjected to either non-disabling or disabling fire, and potentially also if it is damaged deliberately when it is searched. Inadvertent damage may be caused whenever force is used; for example, a warning shot may unintentionally hit and damage the vessel, or damage to property may be an unintended consequence of using force in self-defence.

Considering rights engaged when property is damaged,⁵³ the First Protocol to the European Convention on Human Rights (ECHR),⁵⁴ as well as the American Convention on Human Rights (ACHR)⁵⁵ and African Charter on Human and Peoples' Rights (ACHPR),⁵⁶ but not the International Covenant on Civil and Political Rights (ICCPR),⁵⁷ each contain relevant provisions. Article 1 of the First Protocol to the ECHR states that:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 21(1) ACHR states that, 'Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.' Article 14 of the ACHPR states that, 'The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.'

⁵³ On the right to property, in general, see Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (OUP 2009) 431–39.

⁵⁴ Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 20 March 1952, entered into force 18 May 1954) ETS 9 (ECHR Protocol 1).

⁵⁵ American Convention on Human Rights: 'Pact of San José, Costa Rica' (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 144 (ACHR).

⁵⁶ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (ACHPR).

⁵⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

These rights may clearly apply in situations where individuals have been deprived of their property. However, they may also be engaged where property is subject to damage attributable to the State,⁵⁸ although relevant practice is scarce. In the context of the First Protocol to the ECHR, the European Court of Human Rights (ECtHR) has made clear that the entitlement to peaceful enjoyment of possessions is independent of the right not to be deprived of property,⁵⁹ and has found a State to be in breach of that obligation when damage has been caused to individuals' property.⁶⁰ The Inter-American Court of Human Rights (IACtHR) has found similarly with respect to Article 21 ACHR.⁶¹ While relevant practice with respect to the ACHPR is currently lacking, it is plausible that Article 14 will be applied on a like basis.

In applying these rights, the ECtHR has held that, in cases of interference by the State with an individual's peaceful enjoyment of property, 'the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'.⁶² With respect to the ACHR, Antkowiak and Gonza point out that, in cases concerning the rights of indigenous populations, the IACtHR has applied a test requiring 'restrictions on property rights to be: (1) previously established by law, (2) necessary, (3) proportional, and (4) with the aim of achieving a legitimate objective in a democratic society'.⁶³ However, they note that this test has rarely been applied

⁵⁸ See, for example, Peter Rowe, *The Impact of Human Rights Law on Armed Forces* (CUP 2005) 195. Rowe discusses the issue in the context of armed conflict, but the point is of wider application. See also William A Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 972.

⁵⁹ *Sporrong and Lönnroth v Sweden*, Series A no 52 (ECtHR) [61].

⁶⁰ See, for example, *Öneryıldız v. Turkey*, in which the ECtHR held that art 1 of the First Protocol to the ECHR was engaged when the Turkish government failed to meet its positive obligation to prevent damage to a house destroyed in a methane explosion. The key point for present purposes is simply that property damage attributable to the State is capable of engaging the right to peaceful enjoyment. *Öneryıldız v. Turkey* ECHR 2004-XII 79 [133]–[35].

⁶¹ *Ituango Massacres v Colombia* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 148 (1 July 2008) [172]–[177]. In this case, the Colombian armed forces were found to have been complicit in deliberate damage to property caused by a paramilitary group in the course of an internal armed conflict.

⁶² *Sporrong* (n 59) [69].

⁶³ Thomas M Antkowiak and Alejandra Gonza, *The American Convention on Human Rights: Essential Rights* (OUP 2017) 274 (citation omitted).

to property cases outside this particular context, although it is a test familiar from the IACtHR's analysis of other rights.⁶⁴

Notwithstanding the paucity of practice, an analysis of legality, necessity, proportionality and legitimate aim represents a plausible basis for assessing whether intentional interference with property is in violation of individuals' property rights under each instrument. As is established below with respect to other rights engaged in the course of MSOs, these concepts are pervasive through IHRL, and their application in this context will be no different in principle from its application elsewhere. In particular, the points considered below with respect to the legal basis requirement under both the right to life,⁶⁵ and the right to liberty and security of the person,⁶⁶ are of equal relevance here, too.

As well as a duty to respect individuals' rights to property, there is some support for the suggestion that States may also owe a positive duty with respect to the protection of property from damage. In *Öneryıldız v Turkey* the ECtHR considered whether Turkey had violated Article 1 of the First Protocol to the ECHR when it failed to prevent the destruction of the applicant's house in a methane explosion. The applicant had also alleged a similar failure, amounting to a violation of Article 2 ECHR, to prevent the deaths of several of his relatives. The Court stated that:

Genuine, effective exercise of the right protected by [Article 1 of the First Protocol] does not depend merely on the State's duty not to interfere, but may require positive measures of protection, particularly where there is a direct link between the measures which an applicant may legitimately expect from the authorities and his effective enjoyment of his possessions.⁶⁷

In the circumstances of the case, the Court held that the State's positive obligation arising under Article 1 of the First Protocol required of it the same practical steps as arose from its positive obligations under Article 2.⁶⁸ Although the relevance of property rights is obviously limited only to those instruments in which they are protected, and the limited jurisprudence means that any

⁶⁴ *ibid* 274.

⁶⁵ See below s 4.4.2.2.

⁶⁶ See below 5.4.4.

⁶⁷ *Öneryıldız* (n 60) [134].

⁶⁸ *ibid* [136].

conclusions remain tentative, the points raised below with respect to the positive obligations arising under the right to life are, to some extent, relevant also to property damage.

4.4.1.2. Rights protecting life and bodily integrity

As explained above, when force is used in MSOs, harm may be caused either deliberately (or at least foreseeably) or inadvertently, and by State agents, whether they are complying with or acting outside of rules or procedures established by the State in question. Indeed, as the account above implies, the object of force in MSOs is rarely, if ever, deliberately to cause death, injury or damage, but rather to achieve some other objective, such as the arrest of a vessel or the individuals on board. However, individuals may nevertheless be killed as a foreseen, or unforeseen, consequence of force used for some other purpose, or as a result of force employed by a State agent acting outside the State's rules or procedures. It is therefore important to understand both the negative obligation to *respect* the parameters in the use of force derived from the relevant rights, as well the positive obligation to *protect* individuals, in some circumstances, from the excessive use of force. As explained below, although a State may be entitled to use force in certain circumstances, notwithstanding that it is intended or expected to cause harm, it must meet its obligations to respect the relevant rights when it does so. In addition, it must protect individuals from deliberate excess force, or the unintended consequences of force.

Considering the relevant rights, the most prominent is the right to life,⁶⁹ which is protected by Article 6 ICCPR, which states that, 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'⁷⁰ Both the ACHR and ACHPR set out the right in similar terms. Under Article 4 ACHR, 'Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment

⁶⁹ On the right to life, generally, see Nigel Rodley, 'Integrity of the Person' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, OUP 2014) 184–92; Kälin and Künzli (n 53) 274–303.

⁷⁰ ICCPR (n 57) art 6(1). The remainder of art 6 deals exclusively with capital punishment and the crime of genocide.

of conception. No one shall be arbitrarily deprived of his life.⁷¹ According to Article 4 of the ACHPR, 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.'⁷² While these three provisions are not identical, there is clear overlap in their language. Most importantly, all three instruments prohibit the 'arbitrary' deprivation of life, which, as will be shown, underpins much of the detailed content of the right to life.

The structure of Article 2 ECHR is different to its counterparts in the other instruments under consideration.⁷³ In particular, the term 'arbitrary' does not appear in Article 2, which is as follows:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.⁷⁴

Under the ECHR the taking of life is therefore not unlawful when it results from the use of force in the specific, enumerated circumstances set out in Article 2(2), and so long as to do so is 'absolutely necessary'. Where these criteria are met, force that results in death does not violate the right to life.⁷⁵ Although this construction is, on the face of it, different from that used in the other instruments, subsequent practice has brought the different approaches closer

⁷¹ ACHR (n 55) art 4(1). The remainder of art 4 deals exclusively with capital punishment.

⁷² ACHPR (n 56) art 4.

⁷³ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 2.

⁷⁴ *ibid* art 2.

⁷⁵ Schabas (n 58) 122.

together. From the perspective of the ECHR, where a State seeks to rely on these exceptions, it has been held that its actions must not be arbitrary.⁷⁶ On the other hand, arbitrariness, at least so far as Article 6 ICCPR is concerned, has been interpreted consistently with Article 2 ECHR.⁷⁷

Notwithstanding the express language used in the provisions protecting the right to life, especially the reference in Article 2 ECHR to the ‘intentional’ deprivation of life, they apply to a broader set of circumstances than might at first appear. At least so far as the ECHR is concerned, it may extend to situations where an individual does not actually die, but who nevertheless suffered injuries indicative that his or her life was in ‘serious danger’.⁷⁸ The IAtCHR has similarly considered Article 4 ACHR applicable where individuals have had their lives placed at serious risk but have nevertheless survived.⁷⁹ The ECtHR has also held that Article 2 ECHR ‘covers not only intentional killing but also the situations where it is permitted to use force which may result, as an unintended outcome, in the deprivation of life.’⁸⁰ As Schabas notes, it is no longer seriously disputed that Article 2 ECHR not only limits the circumstances in which a State may intentionally deprive an individual of his or her life, but also entails a positive obligation to safeguard life.⁸¹ The obligations that flow from the right to life are, therefore, both negative—the right not to be arbitrarily deprived of life by the State or its agents—and positive, including a number of duties to protect individuals from arbitrary or unlawful deprivation of life.⁸²

The circumstances in which the right to life has been applied are wide ranging, and have been considered specifically in the context of the use of force by State agents. With respect to the application of Article 6 ICCPR the Human Rights Council (HRC) has stated:

⁷⁶ See, for example, *Finogenov and Others v Russia* ECHR 2011 [207].

⁷⁷ Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (3rd edn, OUP 2013) para 8.05.

⁷⁸ *Krivova v Ukraine* App No 25732/05 (ECtHR, 9 Nov 2010) [45]. See also Schabas (n 58) 125.

⁷⁹ *Antkowiak and Gonza* (n 63) 62–63.

⁸⁰ *Makaratzis v Greece* ECHR 2004-XI 195 [49].

⁸¹ Schabas (n 58) 139–40.

⁸² See, for example, Joseph and Castan (n 77) para 8.01; Schabas (n 58) 122.

that States parties should take measures...to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.⁸³

With respect to the ECHR, in *Finogenov*, the ECtHR stated: 'As the text of Article 2 itself shows, the use of lethal force by law- enforcement officers may be justified in certain circumstances. Nonetheless, Article 2 does not grant them carte blanche. Unregulated and arbitrary action by State agents is incompatible with effective respect for human rights.'⁸⁴ The IACtHR has similarly held with respect to Article 4 ACHR that, 'States have the obligation to guarantee the creation of the conditions required to ensure that violations of this inalienable right do not occur and, in particular, the obligation to prevent its agents from violating this right.'⁸⁵ Likewise, the African Commission has stated that Article 4 ACHPR requires that, 'The State must take all reasonable precautionary steps to protect life and prevent excessive use of force by its agents'.⁸⁶

With regard to the application of the right of life specifically to law enforcement operations, the HRC,⁸⁷ IACtHR,⁸⁸ and ECtHR,⁸⁹ have all made notable

⁸³ UN Human Rights Committee, 'General Comment No 6' (30 April 1982) UN Doc HRI/GEN/1/Rev.1, 6 (HRC General Comment 6) para 3. UN Human Rights Committee, 'Views of the Human Rights Committee under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights Concerning Communication No R.11/45' (Communication submitted on behalf of the husband of Maria Fanny Suarez de Guerrero, concerning Colombia) (Views adopted 31 March 1982) UN Doc A/37/40, 137 (Suarez de Guerrero) para 13.1.

⁸⁴ *Finogenov* (n 76) [207].

⁸⁵ *Landaeta Mejías Brothers et al v Venezuela* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 281 (27 August 2014) [122].

⁸⁶ African Commission on Human and Peoples' Rights, 'General Comment No 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)' (adopted during the 57th Ordinary Session in Banjul, Gambia, 4–18 November 2015) (African Commission General Comment 3) para 27.

⁸⁷ See, for example, UN Human Rights Committee, 'General Comment No 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life' (Revised draft prepared by the Rapporteur) <https://ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf> accessed 5 July 2018 para 19.

⁸⁸ See, for example, *Landaeta Mejías Brothers* (n 85) [126] ('The State must establish precise internal policies in relation to the use of force and identify strategies to implement the Basic Principles on the Use of Force and the Code of Conduct' (citations omitted)).

reference to the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Basic Principles)*.⁹⁰ This soft law document, adopted by the United Nations Congress on the Prevention of Crime and Treatment of Offenders in 1990, emphasises in its preamble the requirement that ‘the use of force and firearms by law enforcement officials should be commensurate with due respect for human rights.’ Although, in itself, not legally binding, its provisions reflect, and have been widely cited in, judgments and treaty-body comments and communications. Similarly, while not written with MSOs specifically in mind, it is submitted that its provisions are equally applicable, and are as capable of being applied, to armed forces and others executing MSOs as they are to other individuals more commonly thought of as law-enforcement officials. It therefore provides an important and influential standard against which the compatibility of MSOs can be measured against relevant rights, including the right to life. Its provisions, so far as they are relevant, are considered below.

Before considering these obligations arising from the right to life in more detail, it should be understood that other rights may be engaged when individuals are harmed in the course of MSOs. An additional right relevant to bodily injury outside the context of detention is the right to liberty and security of the person, at least as it has been interpreted and applied by the HRC. Each of the main instruments under consideration contains a right protecting liberty and security,⁹¹ but these have generally been understood to apply in practice only to situations where individuals are deprived of their liberty.⁹² Nevertheless, with respect to Article 9 ICCPR, the HRC stated in General Comment 35 that the

⁸⁹ See the extensive survey of practice at Schabas (n 58) 130–31.

⁹⁰ ‘Basic Principles on the Use of Force and Firearms by Law Enforcement Officials’ (Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August–7 September 1990) UN Doc A/CONF.144/28/Rev.1, 112 (Basic Principles on the Use of Force and Firearms by Law Enforcement Officials).

⁹¹ ICCPR (n 57) art 9; ECHR (n 73) art 5; ACHR (n 55) art 7; ACHPR (n 56) art 6.

⁹² Schabas (n 58) 228–29; Antkowiak and Gonza (n 63) 146–48. As in other areas, the practice relating to the African Charter is limited on this point, though has so far focused on deprivation of liberty. Bronwen Manby, ‘Civil and Political Rights in the African Charter on Human and Peoples’ Rights: Articles 1–7’ in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples’ Rights* (2nd edn, CUP 2008) 197–98.

right entails obligations with respect to bodily harm to individuals ‘whether the victim is detained or non-detained.’⁹³ Consequently, the practice of the HRC has developed to treat the ‘right to security of person’ as separate and distinct from the ‘right to liberty of person’.⁹⁴

Consistent with its interpretation of the right to life, the HRC has stated that, as well as prohibiting the infliction of unjustifiable bodily injury by State agents,⁹⁵ the right to security of person imposes positive obligations on States ‘to protect individuals from foreseeable threats to life or bodily integrity proceeding from any governmental or private actors.’⁹⁶ However, noting the detailed practice that has developed under the right to life with respect to the use of force in law enforcement operations, including that which is neither intended nor expected to cause death or serious injury, it is difficult, if not impossible, to separate the concrete obligations that arise in this regard under Article 9 ICCPR from those that arise under Article 6 ICCPR.

4.4.2. Application of relevant IHRL principles to MSOs

Noting the obvious potential for the use of force by State agents to cause death or serious injury, either intentionally or inadvertently, it is unsurprising that there is extensive practice relating to the application of the right to life in the context of law-enforcement operations. Given that MSOs are conducted in peacetime, usually to enforce the State’s jurisdiction over individuals, they can be considered at least analogous to other types of law-enforcement operation.⁹⁷ The following analysis therefore proceeds on this basis, setting out the key obligations that flow from the application of the right to life to law enforcement operations generally, before explaining, in turn, how the principles that are identified apply to MSOs. In doing so, it focuses, in particular, on those obligations that are particularly affected in their application by the MSO context.

⁹³ UN Human Rights Committee, ‘General Comment No 35’ (16 December 2014) UN Doc CCPR/C/GC/35 (HRC General Comment 35) para 9.

⁹⁴ The terminology used for the two rights is that used by the HRC in General Comment 35. *ibid* paras 3, 9. See also Joseph and Castan (n 77) paras 11.03–11.07.

⁹⁵ HRC General Comment 35 (n 93) para 9.

⁹⁶ *ibid*. See also Schabas (n 58) 228–29.

⁹⁷ See, for example, Tullio Treves and Cesare Pitea, ‘Piracy, International Law and Human Rights’ in Nehal Bhuta (ed), *The Frontiers of Human Rights: Extraterritoriality and its Challenges* (OUP 2016) 113–14.

These obligations relate almost exclusively to the right to life, though some, particularly in their expression through the *Basic Principles*, make reference, explicitly or implicitly, to the protection of property and the right to security of the person, at least as interpreted by the HRC. However, the extensive jurisprudence relating to the right to life demonstrates its central importance in the context of law-enforcement operations generally, particularly in light of its broad application beyond just intentional killing, and therefore to MSOs.

4.4.2.1. The requirements of necessity and proportionality in the use of force

As set out above, the ICCPR, ACHR and ACHPR prohibit the arbitrary deprivation of life. In the context of the use of force by law-enforcement officers, this has been interpreted by the HRC to mean that the right to life would be violated where death resulted from actions that were ‘disproportionate to the requirements of law enforcement in the circumstances of the case’.⁹⁸ Such a requirement to use force would exist where ‘necessary in [the police’s] defence or that of others’, and where ‘necessary to effect the arrest or prevent the escape of’ those suspected of an offence.⁹⁹ As Joseph and Castan note, these mirror the first two situations, set out in express terms in Article 2 ECHR, in which lethal force may be permitted under that instrument.¹⁰⁰

With respect to the ACHR, the IACtHR, on reviewing the relevant jurisprudence, has stated ‘that force or coercive means can only be used once all other methods of control have been exhausted and have failed’,¹⁰¹ and that:

The use of lethal force and firearms against individuals by law enforcement officials – which must be forbidden as a general rule – is only justified in even more extraordinary cases. The exceptional circumstances under which firearms and lethal force may be used shall be determined by the law and restrictively construed, so that they are used to the minimum extent possible in all circumstances and never exceed the use which is “absolutely necessary” in relation to the force or threat to be repealed.

⁹⁸ Suarez de Guerrero (n 83) para 13.3.

⁹⁹ *ibid* para 13.2.

¹⁰⁰ Joseph and Castan (n 77) para 8.05. See below in relation to ECHR Art. 2.

¹⁰¹ *Zambrano Vélez et al v Ecuador* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 166 (4 July 2007) [83]. See also *Antkowiak and Gonza* (n 63) 82.

When excessive force is used, any resulting deprivation of life is arbitrary.¹⁰²

To illustrate, the IACtHR has not considered the requirement of absolute necessity to have been met, for example, where lethal force was used to detain individuals who did not pose a danger.¹⁰³ It has further emphasised that, 'Excessive or disproportionate use of force by law enforcement officials that result in the loss of life may...amount to arbitrary deprivations of life.'¹⁰⁴ Force may be disproportionate where lesser, non-violent means, would have achieved the relevant aim.¹⁰⁵

Similarly, the African Commission has stated that Article 4 ACHPR requires that

Force may be used in law enforcement only in order to stop an imminent threat. The intentional lethal use of force by law enforcement officials and others is prohibited unless it is strictly unavoidable in order to protect life (making it proportionate) and all other means are insufficient to achieve that objective (making it necessary).¹⁰⁶

Turning to the ECHR, which, as noted above, enumerates the circumstances in which lethal force may be permitted, the requirement of 'absolute' necessity restricts the circumstances in which those grounds can be relied upon. With respect to the use of force 'in defence of any person from unlawful violence',¹⁰⁷ Schabas summarises the case law of the ECtHR as meaning that, 'Lethal force in self-defence will only be justified if a serious threat of death or serious injury is perceived.'¹⁰⁸ Similarly, with respect to the use of force 'in order to effect a lawful arrest or to prevent the escape of a person lawfully detained',¹⁰⁹ the ECtHR has stated that the test of absolute necessity is not met 'where it is known that the person to be arrested poses no threat to life or limb and is not

¹⁰² *Zambrano Vélez* (n 101) [84] (citations omitted).

¹⁰³ *Antkowiak and Gonza* (n 63) 84.

¹⁰⁴ *Zambrano Vélez* (n 101) [85].

¹⁰⁵ *Antkowiak and Gonza* (n 63) 85.

¹⁰⁶ African Commission on Human and Peoples' Rights, 'General Comment No 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)' (adopted during the 57th Ordinary Session in Banjul, Gambia, 4–18 November 2015) para 27.

¹⁰⁷ ECHR (n 73) art 2(2)(a).

¹⁰⁸ Schabas (n 58) 148–49.

¹⁰⁹ ECHR (n 73) art 2(2)(b).

suspected of having committed a violent offence, even if a failure to use lethal force may result in the opportunity to arrest the fugitive being lost.¹¹⁰

Consistent with this, the *Basic Principles* require, *inter alia*, that:

4. Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.
5. Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:
 - (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;
 - (b) Minimize damage and injury, and respect and preserve human life; ...¹¹¹

In particular, with respect to the use of firearms against persons:

9. Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.
10. In the circumstances provided for under principle 9, law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident.¹¹²

To summarise the relevant principles that can be identified from across the different human rights treaties and systems, although it can be difficult to

¹¹⁰ *Nachova and Others v Bulgaria* ECHR 2005-VII 1 [95].

¹¹¹ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (n 90) paras 4–5.

¹¹² *ibid* 9–10.

separate out the requirements of necessity and proportionality, it is clear that force must be both necessary, meaning that it may only be used where non-violent measures would be insufficient, and limited to that which is proportionate to the aim in pursuit of which force is to be used. Lethal force is permitted only in narrow circumstances, including defence of self and others, and to arrest or prevent the escape of an individual, but only where strictly necessary to protect life, or at least prevent serious injury. Furthermore, it will only be permitted only when less violent means have proven, or would prove to be, ineffective.

More broadly, all force, whether intended or likely to kill or not, is subject to requirements of necessity and proportionality. The reference to the minimization of 'damage and injury' in the *Basic Principles* arguably relates to the existence, as discussed above, of other human right norms that are relevant to the use of force, noting that the *Basic Principles* are derived not just from the right to life. However, given that death or serious injury may arise from law-enforcement operations in which that result is not intended, or even necessarily foreseen, it makes sense that the right to life would also entail restrictions on *any* use of force by law-enforcement officials. These are also reflected in the obligations, discussed below, to regulate the use of force in such situations; to plan law-enforcement operations so as to minimise the recourse to force; and to train and equip law-enforcement officials appropriately.

Applying these principles to MSOs, it is clear that lethal force, in the sense of force intended, or likely, to cause death or serious injury is likely to be justified only in exceptional circumstances, just as in other law-enforcement situations. The most plausible situation is the use of force, either by a ship or by individuals members of a boarding party, to use lethal force to defend themselves or others from an imminent threat to life. Less plausible, though still conceivable, is that lethal force could be justified to effect the arrest of a vessel, or of individuals on board a vessel, where necessary to avert a threat to life, such as might be the case with respect to known terrorists or, for example, where pirates are expected to kill or seriously injure those that they attack. However, outside of these narrow circumstances, the criteria for the use of lethal force would not be met. With respect to the use of force in MSOs more broadly, States are required to exercise restraint, taking into account the reason, for example, for wanting to

interdict a vessel, and resorting to force only where non-violent means are ineffective.

To a large extent, these principles are reflected in the practice described above, as well as in the restrictions on the use of force under the law of the sea, as identified by the ITLOS in the *M/V 'Saiga' (No. 2)* case. So far as force in MSOs is used in accordance with the practice described above, lethal force is not generally used to interdict vessels; in particular, neither non-disabling nor disabling fire are intended, nor to be employed so as to be expected, to cause death or serious injury. Moreover, the IHRL requirement to act with restraint in the use of *any* force, and to use force only where less-violent means are ineffective, is reflected in the practice of escalating the type of force used, through non-disabling and disabling fire, and the use of warnings and warning shots before doing so. To this extent, it is likely that the practice described, consistent with the law as stated by the ITLOS, is also consistent with the relevant IHRL norms.

Where a potential issue may lie, however, is in the requirement when using force, set out in the *Basic Principles*, to 'act in proportion to the seriousness of the offence'.¹¹³ It should be recalled in this context that the interdiction of vessels may be justified in a diverse range of circumstances. However, neither the practice set out above, nor the statement of the law by the ITLOS in *M/V 'Saiga' (No. 2)*, entails, explicitly at least, weighing the use of force against the purpose for which a vessel is to be interdicted. Applying the requirement set out in the *Basic Principles*, a State is arguably required to consider whether the reason for interdicting a vessel is sufficiently serious to justify the use of force at all, whether or not it is intended or expected to be lethal. This is a more rigorous standard than that identified by the ITLOS in *M/V 'Saiga' (No. 2)*; it means that the importance of interdicting a particular vessel ought at least to be considered when deciding whether and what force to use to do so. It also means, ultimately, that there may be situations where force is not justified at all.

¹¹³ *ibid* para 5(a).

4.4.2.2. *The requirement that the use of force be authorised and regulated by law*

Practice relating to the right to life where force is used by State agents demonstrates that force must be subject to authorization and regulation by law—a principle sometimes described as that of ‘legality’.¹¹⁴ The HRC has stated that ‘the law must strictly control and limit the circumstances in which a person may be deprived of his life by [State] authorities.’¹¹⁵ The ECtHR has held that ‘as well as being authorised under national law, policing operations must be sufficiently regulated by it, within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force, and even against avoidable accident.’¹¹⁶ In interpreting Article 4 ACHR, the IACtHR has stated that ‘it is essential that the State...has an appropriate legal framework regulating the use of force that ensures the right to life’.¹¹⁷ Similarly, the African Commission has interpreted Article 4 ACHPR as requiring that ‘States must adopt a clear legislative framework for the use of force by law-enforcement and other actors that complies with international standards, including the principles of necessity and proportionality.’¹¹⁸

The *Basic Principles* similarly state, in general, that ‘Governments and law enforcement agencies shall adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials.’¹¹⁹ However, they also provide a good deal more detail as to exactly what matters ought to be regulated. Specifically, rules and regulations concerning the use of force ‘should include guidelines’ that do the following:

- (a) Specify the circumstances under which law enforcement officials are authorized to carry firearms and prescribe the types of firearms and ammunition permitted;
- (b) Ensure that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm;

¹¹⁴ See, for example, Antkowiak and Gonza (n 63) 83.

¹¹⁵ UN Human Rights Committee, ‘General Comment No 6’ (30 April 1982) UN Doc HRI/GEN/1/Rev.1, 6 para 3.

¹¹⁶ *Finogenov* (n 76) [207] (citation omitted).

¹¹⁷ *Landaeta Mejías Brothers* (n 85) [126].

¹¹⁸ African Commission General Comment 3 (n 86) para 27.

¹¹⁹ *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (n 90) para 1.

- (c) Prohibit the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk;
- (d) Regulate the control, storage and issuing of firearms, including procedures for ensuring that law enforcement officials are accountable for the firearms and ammunition issued to them;
- (e) Provide for warnings to be given, if appropriate, when firearms are to be discharged;
- (f) Provide for a system of reporting whenever law enforcement officials use firearms in the performance of their duty.¹²⁰

Although the language used differs, underlying each of these statements is the requirement, set out particularly clearly by the ECtHR, that the use of force be both *authorised* by law, meaning that there must be a lawful basis for the use of force, and *regulated* by law, meaning that the law must control the circumstances in which force may be used. Crucially, it is clear from their formulation that these obligations extend beyond situations in which State *intends* to deprive an individual of his or her life, to wherever force is used by law-enforcement officials. Indeed, the central purpose of such a legal framework of authority and regulation must be to restrain State agents from depriving individuals of their life contrary to the principles set out above. It is therefore particularly relevant to situations in which an individual is deprived of his or her life notwithstanding the use of force was not intended nor expected to bring about that result. In that situation, the absence of an adequate system of legal authority and regulation will amount, in its own right, to a violation of the right to life on the part of the State. This is clearly relevant to MSOs. Whilst the force used is not usually intended to be lethal, it nevertheless has the potential to cause injury or death if not properly controlled.

As set out in Chapter Five, a similar requirement of authorisation and regulation by law exists with respect to detention. The discussion there as to the source or sources from which the law in question can be derived (domestic, international or both) is equally as valid in the context of the use of force.¹²¹ In brief, while reference is often made only to domestic or national law, for example by the

¹²⁰ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (n 90) para 11.

¹²¹ See below s 5.4.4.

ECtHR in the extract above from *Finogenov and Others v Russia*, it is unclear whether the relevant authority and regulation may *only* be located in domestic law, or if it may be found in international law instead. If only domestic law will suffice, then international law would arguably qualify only if incorporated or otherwise recognised at the domestic level according to each State's particular constitutional arrangements.¹²² However, it is argued in Chapter Five that the more persuasive argument is that it should be the existence of 'legal certainty' that is decisive rather than any formal requirement as to source. This concept has been described consistently by the ECtHR as requiring 'that all law be sufficiently accessible and precise to allow the person— if necessary with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'.¹²³ Nevertheless, this remains an unsettled issue, and one of possible divergence between the different instruments under consideration.

Turning, with this caveat in mind, to the question of the authorisation and regulation of the use of force in MSOs, the first point is that authority to use force in MSOs does not come from a single source. As noted above and set out in more detail in Chapter One, authority for MSOs is often, though not exclusively,¹²⁴ found in international law. However, it may derive from customary or treaty law; it may be multilateral or bilateral; and it may be enduring or established on a case-by-case basis. Nevertheless, wherever the authority to arrest a vessel is found in the law of the sea, it is arguable that it will carry the implicit permission to use necessary and proportionate force to do so, by application of the customary law principles identified by the ITLOS in *M/V 'Saiga' (No. 2)*.¹²⁵ According to this reasoning, so long as authority exists under the law of the sea to arrest a vessel, force will be authorised to effect the arrest, at least so far as international law is concerned.

¹²² See, for example, Malcolm N Shaw, *International Law* (7th edn, CUP 2014) 92–141.

¹²³ See, for example, *Hilda Hafsteinsdóttir v Iceland* App No 40905/98 (ECtHR 8, June 2004) [51]. To note, however, this case concerned art 5.

¹²⁴ For example, MSOs conducted in a State's own territorial waters, in respect of which the law of the sea provides only that States are not prohibited from exercising their jurisdiction.

¹²⁵ See above s 4.2.

States may, of course, enact domestic law specifically to authorise the use of force in MSOs. In the United States, 14 U.S Code § 637 authorises certain Coast Guard and other government vessels to ‘fire at or into [a vessel liable to seizure or examination] which does not stop’,¹²⁶ so long as a warning shot is first fired, unless to do so ‘would unreasonably endanger persons or property in the vicinity of the vessel to be stopped.’¹²⁷ It also indemnifies the person in command of the vessel that authorises the use of force pursuant to the section.¹²⁸

In Australia, the Maritime Powers Act 2013 (MPA 2013) provides a remarkably detailed legal framework for the authorisation and execution of MSOs. As well as a general authorisation for designated individuals exercising powers under the MPA 2013 to ‘use such force against a person or thing as is necessary and reasonable in the circumstances’,¹²⁹ it contains specific authorisation, where ‘the person in charge of a vessel does not comply with a requirement to stop or facilitate boarding of the vessel’, to:

- (a) chase the vessel;
- (b) use any reasonable means to obstruct the passage of the vessel;
- (c) use any reasonable means to halt or slow the passage of the vessel, including by fouling the propellers of the vessel;
- (d) after firing a warning shot, fire at or into the vessel to disable it or compel it to be brought to for boarding.¹³⁰

The MPA 2013 is unusual in providing such clear and detailed authorisation for the use of force in MSOs. Many other States, including the United Kingdom, have no equivalent in their domestic legislation. Nevertheless, while noting the

¹²⁶ 14 US Code § 637 (a)(1).

¹²⁷ 14 US Code § 637 (a)(2)

¹²⁸ 14 US Code § 637 (b).

¹²⁹ Maritime Powers Act 2013 s 37(1). This is subject to the restriction that the authorised individual ‘must not...do anything that is likely to cause the death of, or grievous bodily harm to, a person unless: (i) the officer believes on reasonable grounds that doing that thing is necessary to protect life or prevent serious injury to another person (including the officer); and (ii) if the person is attempting to escape arrest by fleeing—the person has, if practicable, been called on to surrender and the officer believes on reasonable grounds that the person cannot be apprehended in any other manner.’ *ibid* s 37(2)

¹³⁰ *ibid* s 54(3)

discussion above concerning the source of the authorisation, for States without such domestic legislation, it is at least arguable that international law may suffice to provide the *authority* to use force, at least with respect to interdictions authorised by the law of the sea. The more challenging requirement under the right to life is arguably that the use of force must be *regulated* by law.

Considering international law, it is possible to identify rules that arguably do regulate, to some extent, the use of force in certain categories of MSOs.¹³¹ For example, where applicable to the MSO in question, a degree of regulation is contained in the FSA and SUA, discussed above, which permit only force that is necessary and reasonable. More generally, the customary law principles identified in *M/V 'Saiga' (No. 2)* require not only that force used in order to arrest a vessel be necessary and reasonable, but must follow an escalatory process, including the issuing of warnings. More specific still may be rules contained in the various bilateral and multilateral agreements that authorise MSOs, such as Caribbean Area Agreement, also discussed above; however, not only are those rules limited in their application only to the specific subject matter of the instruments in question, but also do not set forth complete regulatory regimes. Indeed, the Caribbean Area Agreement makes specific reference to the applicability of external regulation contained in the domestic law of coastal and flag States.¹³² In any case, absent from all of these is the detailed regulation required under the *Basic Principles*, such as the specification of circumstances in which firearms may be carried, the type of firearm and ammunition that may be carried, and the procedures for their control, storage and issue.¹³³

A helpful comparison may be made to the ECtHR's decision in *Makaratzis v Greece*, which concerned the use of firearms by Greek police officers during a car chase. The Court noted that, at the time of the incident, the use of firearms was regulated by an old statute that 'listed a wide range of situations in which a police officer could use firearms without being liable for the consequences', subject only to a later decree that they be used 'only when absolutely necessary

¹³¹ See above s 4.3.

¹³² For example, art 9(3) makes certain powers of enforcement officers '[s]ubject to the domestic laws and regulations of the designating Party'. Caribbean Area Agreement (n 47) art 9(3).

¹³³ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (n 90) para 11(a) and (d).

and when all less extreme methods have been exhausted'.¹³⁴ This, arguably, is broadly similar to the level of regulation described above under the law of the sea. However, the ECtHR in *Makaratzis* considered that, 'On its face, the above, somewhat slender, legal framework would not appear sufficient to provide the level of protection "by law" of the right to life that is required in present-day democratic societies in Europe.'¹³⁵

Arguably, therefore, the law of the sea is unlikely to be adequate in its regulation of the use of force in MSOs to meet the requirements of the right to life, meaning that it must be supplemented by more detailed regulation, most likely at the domestic level. A detailed analysis of whether and how different States have met this standard is beyond the scope of this thesis. However, it may be achieved in part, particularly with respect to the use of force on board interdicted vessels, through the extension of laws and regulations normally applicable on land to the maritime environment. For example, the Australian MPA 2013 permits officials who are 'authorised in another capacity' to carry and use arms to do so, subject to any conditions that apply in that other capacity, when exercising powers under the MPA 2013.¹³⁶ Other areas, particularly those that are specific to MSOs, such as the use of disabling fire against vessels, may require bespoke regulation, such as that contained in the MPA 2013, or plausibly such as might be contained in instructions, such as rules of engagement, issued to the military, so long as these meet the test of foreseeability set out above.

4.4.2.3. Obligations relating to the planning and allocation of resources to MSOs

A State's obligations under the right to life in connection with law-enforcement activities begin well before the point at which force is used, including the planning an operation and the allocation of resources to it. The IACtHR has held that, before using force, 'State agents should assess the situation and

¹³⁴ *Makaratzis* (n 80) [62].

¹³⁵ *ibid.*

¹³⁶ Maritime Powers Act 2013 s 105.

draw up a plan of action before intervening.¹³⁷ The African Commission has, likewise, stated that the steps required of States include ‘wherever possible, careful planning of individual operations.’¹³⁸ It has also stated, with respect to the allocation of resources, that law-enforcement personnel ‘must receive appropriate...equipment’,¹³⁹ and that, ‘Particular attention should be paid to ensuring the availability and use of weapons less likely to cause death or serious injury than are firearms.’¹⁴⁰ The *Basic Principles* do not refer explicitly to planning, but state that

Governments and law enforcement agencies should develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms. These should include the development of non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons.¹⁴¹

The requirement to plan operations so as to minimise recourse to lethal force is particularly well established in the jurisprudence of the ECtHR. The case of *McCann and Others v United Kingdom*, concerned the question whether an operation conducted by special forces soldiers, taken as a whole to include its planning and organization, had violated Article 2 of the ECHR.¹⁴² In *McCann*, the UK authorities were alleged to have failed to arrest suspects at a point where doing so would have avoided the need to use lethal force against the suspects later on.¹⁴³ The ECtHR accepted that, at the point that lethal force was eventually used, the UK was under an obligation to protect the local population. As a result, the eventual shooting of the suspects was, taken in isolation, necessary and therefore not, in itself, a violation of Article 2. However, the Court held that the UK had failed properly to control the operation so as to avoid the

¹³⁷ *Nadege Dorzema et al v Dominican Republic* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 251 (24 October 2012) [84]. See also *Landaeta Mejías Brothers* (n 85) [130].

¹³⁸ African Commission General Comment 3 (n 86) para 27.

¹³⁹ *ibid* para 29.

¹⁴⁰ African Commission General Comment 3 (n 86) para 30.

¹⁴¹ *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (n 90) para 2.

¹⁴² See, for example, Louis Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (OUP 2011) 165–66.

¹⁴³ *McCann and Others v the United Kingdom Series A no 324 (ECtHR)*. The facts are set out at *ibid* [13]–[102].

situation where lethal force became necessary.¹⁴⁴ Therefore, despite the necessity of lethal force at the point it was used, the operation as a whole was held to be in violation of Article 2. Although *McCann* concerned the ultimate use of force that must have been intended, or at least expected, to cause death or serious injury, as explained above, the right to life entails obligations with respect to the use of any force that results in death (or even, in some cases, serious injury). It follows that the requirement to plan operations extends to those involving, or potentially involving, any use of force.

Nevertheless, it is important not to overstate the standard required of those planning and controlling operations. In the case of *McCann* the Court identified that there had been a 'serious miscalculation by those responsible for controlling the operation.' As a result of the planning and control failures, the eventual necessity to use lethal force became 'a foreseeable possibility if not a likelihood.'¹⁴⁵ The Court was not, therefore, taking advantage of hindsight simply to postulate a different course of action that would not have resulted in the use of lethal force. Rather, its approach was to examine the situation as it was presented to those in charge and evaluating the quality of the decisions they made on the basis of the information they had.

With respect to planning and the allocation of resources, the UK Supreme Court has recognised that the right to life under the ECHR may, in some circumstances, require the provision of suitable equipment. In *Smith (No. 2) v The Ministry of Defence* it held that Article 2 could potentially be breached where a government fails to equip its own forces adequately to protect the soldiers' right to life.¹⁴⁶ Having reviewed the ECtHR's jurisprudence, the Supreme Court concluded that it was required to

avoid imposing positive obligations on the state in connection with the planning for and conduct of military operations in situations of armed conflict which are unrealistic or disproportionate. But it must give effect to

¹⁴⁴ *ibid* [202]–[214].

¹⁴⁵ *ibid* [205].

¹⁴⁶ *Smith (No. 2) v The Ministry of Defence* [2013] UKSC 41. The case specifically concerned the provision of sufficiently well-armoured vehicles, rather than lightweight 'Snatch' Land Rovers, to soldiers operating in an environment where they were subject to attack using roadside explosives. The facts are set out at *ibid* [1]–[8].

those obligations where it would be reasonable to expect the individual to be afforded the protection of the article.¹⁴⁷

While the case was dealing specifically with the rights of personnel *using* the equipment in question, rather than those against whom it would be used, the reasoning can be extended to other affected individuals for whom the protection of the right to life is 'reasonable', including, it is submitted, those against whom military equipment is used.

These principles have obvious relevance to the conduct of MSOs. With respect to planning, it may be insufficient that an interdicting vessel follows an escalation of force process if that escalation leads to loss of life (or serious injury) that could reasonably have been avoided through better planning. For example, if the necessity to use force to arrest a vessel at sea could foreseeably have been prevented by stopping it from leaving port, then any loss or threat to life could be in breach of the right to life, however justifiable the subsequent interdiction of the vessel might be. More generally, the proper planning of MSOs may involve both the choice of means and methods appropriate to the particular circumstances, as well as the coordination of complex activity undertaken by a range of actors. The discussion of practice above demonstrated both the potential complexity of MSOs, as well as the diverse range of techniques that may be used in their execution. While the ITLOS in *M/V 'Saiga' (No. 2)* referred to the escalation through a limited range of options, in practice the interdiction of vessels can involve the use of force from both sea and air, as well as the use of various non-lethal methods and advanced techniques including the insertion of special forces teams by air.

Closely related to the requirement to plan MSOs so as to avoid loss of life, is the requirement that they should be appropriately resourced. For example, where firearms are used against a vessel, either as non-disabling or disabling fire, the risk of inadvertently causing death or injury may be reduced by using more precise weapons, operated by more highly skilled personnel. Similarly, it was noted that an opposed boarding could be achieved by means of a 'vertical take-down', involving the use of special operations forces to seize control of a

¹⁴⁷ *ibid* [76].

vessel 'often without endangering the crew'.¹⁴⁸ Such resources may be scarce and a balance must therefore be struck between the improvement in safety that a particular capability might bring and the difficulty, or cost, involved in implementing it. However, if the test identified by the UK Supreme Court in *Smith (No. 2)* is extended to this situation, then, where reasonable, and not disproportionate or unrealistic to do so, such resources must be made available. Although somewhat nebulous, this requirement, at the very least, means that the use of particular methods or means will be lawful simply because they are the only ones available. For example, if the use of a precision marksman operating from a helicopter to effect disabling fire would be less likely to cause death or serious injury than the use of a ship's main armament, the lack of the former capability would not, in itself, justify the use of the latter. Instead, it would need to be shown that the provision of the more precise capability would be disproportionate, unrealistic or unreasonable.

4.4.2.4. *The requirement to train officials conducting MSOs*

A step further removed from the actual use of force, a State's obligations with respect to the use of force extends to a situation where death or serious injury can be attributed to the insufficiency of the training provided to personnel who use force in the course of law-enforcement operations. With respect to the ICCPR, Joseph and Castan conclude that the obligation to train such personnel is something that can be assumed on the basis of the HRC's practice with respect to other rights.¹⁴⁹ More specifically, the IACtHR has stated that, 'The State must also train its agents to ensure that they know the legal provisions that permit the use of firearms and are properly trained so that if they have to decide on their use, they have the relevant criteria do so.'¹⁵⁰ This requirement has been echoed by the African Commission,¹⁵¹ and is reflected in the *Basic Principles*, which state that:

19. Governments and law enforcement agencies shall ensure that all law enforcement officials are provided with training and are tested in accordance with appropriate proficiency standards in the use of force. Those law enforcement officials who are required to carry

¹⁴⁸ Allen (n 11) 105. See also above s 4.3.

¹⁴⁹ Joseph and Castan (n 77) para 8.35.

¹⁵⁰ *Nadege Dorzema* (n 137) [81].

¹⁵¹ African Commission General Comment 3 (n 86) para 27.

firearms should be authorized to do so only upon completion of special training in their use.

20. In the training of law enforcement officials, Governments and law enforcement agencies shall give special attention to issues of police ethics and human rights, especially in the investigative process, to alternatives to the use of force and firearms, including the peaceful settlement of conflicts, the understanding of crowd behaviour, and the methods of persuasion, negotiation and mediation, as well as to technical means, with a view to limiting the use of force and firearms. Law enforcement agencies should review their training programmes and operational procedures in the light of particular incidents.¹⁵²

A particular issue in this regard relates to the use of military forces for law-enforcement tasks. As reflected in the discussion on current practice, MSOs are often conducted by naval forces rather than by dedicated law-enforcement officers such as the coast guard or domestic police force. The use of the military for law-enforcement activities, in general, is discouraged, but not prohibited 'in exceptional circumstances and where strictly necessary'.¹⁵³ Nevertheless, it is appropriate that there should be, as the IACtHR has stated, a 'clear demarcation between military and police duties'.¹⁵⁴ This arguably involves a particular obligation to ensure that military forces are trained in the use of force to a similar standard as applied by their civilian law-enforcement counterparts. On this point, the ECtHR held in the *McCann* case that

[The soldiers'] reflex action [lacked] the degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society, even when dealing with dangerous terrorist suspects, and stands in marked contrast to the standard of care reflected in the instructions in the use of firearms by the police which had been drawn to their attention and which emphasised the legal responsibilities of the individual officer in the light of conditions prevailing at the moment of engagement.¹⁵⁵

¹⁵² Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (n 90) paras 19–20. According to para 18, personnel must furthermore be 'selected by proper screening procedures, have appropriate moral, psychological and physical qualities for the effective exercise of their functions and receive continuous and thorough professional training. Their continued fitness to perform these functions should be subject to periodic review.' Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (n 90) para 18.

¹⁵³ African Commission General Comment 3 (n 86) para 29. See also Antkowiak and Gonza (n 63) 82–83.

¹⁵⁴ *Zambrano Vélez* (n 101) [51].

¹⁵⁵ *McCann* (n 143) [212].

With respect to MSOs, while law enforcement activities on land are only exceptionally carried out by military personnel, many States use their navies to conduct peacetime law enforcement activities at sea.¹⁵⁶ Indeed, the use of warships for such tasks is specifically authorised in the law of the sea.¹⁵⁷ Although States might ideally maintain separate maritime law enforcement agencies, the expense of doing so means that navies are likely to continue to undertake law enforcement activities. It is therefore of particular importance to ensure that navy personnel are equipped with the skills required to use force consistent with the law enforcement paradigm. Such training may be provided to all members of a navy, or only for specific personnel, so long as it equips personnel responsible for using force with the skills required to minimise the risk to life.

The obligation to train personnel is particularly acute with respect to specialist tasks such as the use of gunfire to disable vessels. Such force may be used in particularly challenging circumstances, including from moving aerial platforms, against small moving targets, and with individuals close to the intended point of impact. In accordance with the principles set out above, the personnel responsible for using force in these circumstances must be trained not only to know when force may lawfully be used, but also to use force in such a way as to minimise the risk to life. As explained above in the context of the appropriate resourcing of MSOs, unless to do so is disproportionate, unrealistic or unreasonable, it is likely that the lawful use of such force is contingent on it being conducted by suitably trained personnel.

4.4.2.5. Obligations following the use of force

Where force has been used and has resulted in injury, States are under an obligation to provide necessary medical care and inform relatives as soon as possible. These requirements are contained in the *Basic Principles* and have been recognised by the ECtHR¹⁵⁸ and IACtHR¹⁵⁹. The requirement to provide medical care, in particular, may be challenging in the context of MSOs, where

¹⁵⁶ Even in the case of the United States, which has a dedicated maritime law enforcement agency, US Navy warships are still regularly deployed in support of counter-piracy and other maritime security taskings.

¹⁵⁷ See, for example, UNCLOS (n 32) art 110.

¹⁵⁸ *Finogenov* (n 76) [163].

¹⁵⁹ *Landaeta Mejías Brothers* (n 85) [143].

force will often be used against a vessel before the interdicting ship has personnel on board, and where access to medical facilities may be limited by the interdicting ship's own resources and the difficulty in transporting a casualty ashore. Nevertheless, consistent with the general requirement, discussed above, to plan and resource MSOs appropriately, it follows that the ability and means to provide medical care in the case of injury should be included, to the extent that it is reasonable, realistic and proportionate to do so.

In addition, the obligation to investigate alleged breaches of the right to life and to punish those responsible is well-established.¹⁶⁰ Although there is nothing special or unusual about its application to MSOs and while it will not, therefore, be analysed in any great depth here, it is an important requirement nonetheless. With respect to Article 6 ICCPR, the practice of the HRC has been to require an adequate investigation in the case of all State killings and to bring to justice those identified as having violated the law,¹⁶¹ in respect of whom only criminal proceedings, rather than mere disciplinary procedures, will be adequate.¹⁶² For example, in connection with the killing of a suspected terrorist (who turned out to be the victim of mistaken identity) by UK police, the HRC recommended that the UK pursue the investigation 'vigorously, including on questions of individual responsibility, intelligence failures and police training'.¹⁶³

The IACtHR has stated that incidents 'must be investigated in order to determine the level and manner of participation of each of those who intervened, whether directly or indirectly, so that the corresponding

¹⁶⁰ See, for example, Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (OUP 2009) 188–89.

¹⁶¹ Joseph and Castan (n 77) paras 8.16–8.26.

¹⁶² UN Human Rights Committee, 'Views of the Human Rights Committee under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights Concerning Communication No 436/2005' (Communication submitted by Mr Vadivel Sathasivam and Mrs Parathesi Saraswathi, concerning Sri Lanka) (Views adopted 8 July 2008) UN Doc CCPR/C/93/D/1436/2005 para 3.7 ('Mere disciplinary measures, which trivialize so serious an offence are no substitute for criminal investigation and prosecution, which are required to be adopted in cases of arbitrary taking of life.' (citations omitted)).

¹⁶³ Joseph and Castan (n 77) para 8.11 (citing UN Human Rights Committee, 'Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland' (30 July 2008) UN Doc CCPR/C/GBR/CO/6 para 10).

responsibilities may be established.’¹⁶⁴ The African Commission has been even clearer in stating that:

The failure of the State transparently to take all necessary measures to investigate suspicious deaths and all killings by State agents and to identify and hold accountable individuals or groups responsible for violations of the right to life constitutes in itself a violation by the State of that right. This is even more the case where there is tolerance of a culture of impunity. All investigations must be prompt, impartial, thorough and transparent.¹⁶⁵

It goes on to state that, ‘Accountability, in this sense, requires investigation and, where appropriate criminal prosecution.’¹⁶⁶ Similarly, the ECtHR has recognised a procedural obligation under Article 2 for there to be an investigation that is thorough, independent, prompt and accessible, and to hold those responsible to account. This entails an obligation to pursue criminal prosecution where appropriate, with civil redress alone being inadequate.¹⁶⁷

Conducting an investigation that meets these standards following a MSO may pose considerable practical challenges. While the requirement of independence will almost certainly require the intervention of outside authorities, the vessel responsible for the alleged breach may be the only entity capable of securing perishable evidence and conducting the initial stages of the inquiry. However, this has not prevented the same requirements from being held to apply, for example, with respect to the deaths caused in the course of military operations conducted overseas on land. The ECtHR has stated ‘that the procedural obligation under Article 2 continues to apply in difficult security conditions, including in a context of armed conflict’.¹⁶⁸ In such circumstances, although ‘concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed...all reasonable steps must be taken to ensure that an effective, independent investigation is conducted.’¹⁶⁹ There is therefore no reason why these requirements would not apply equally to MSOs and ought therefore to be considered in the planning and resourcing of operations.

¹⁶⁴ *Landaeta Mejías Brothers* (n 85) [143].

¹⁶⁵ African Commission General Comment 3 (n 86) para 15.

¹⁶⁶ African Commission General Comment 3 (n 86) para 17.

¹⁶⁷ See the survey of practice at Schabas (n 58) 134–37.

¹⁶⁸ *Al-Skeini and Others v the United Kingdom* ECHR 2011 [164].

¹⁶⁹ *ibid.*

4.5. Conclusion

This chapter began with a summary of current practice with respect to the use of force in MSOs. It explained that force may be used at various stages in the course of an MSO and that a variety of means and methods may be brought to bear. Importantly, force used in MSOs is rarely intended or expected to cause death or serious injury; rather it is often used to compel a vessel to comply with the instructions of an interdicting ship, by either demonstrating the willingness and intent of the interdicting ship, or by physically affecting the ability of the interdicted vessel to resist boarding.

The use of force is regulated, to some extent, by the law of the sea. UNCLOS does not, itself, contain provisions that limit force or prescribe how it is to be used; however, the ITLOS has recognised the requirement to use only force in interdicting a vessel that is reasonable and necessary, and to follow a procedure whereby force is escalated through a progression of measures, beginning with warnings and ending with disabling fire. Similar requirements have been incorporated into a range of agreements dealing with particular situations in which the interdiction of vessels is authorised.

Turning to applicable human rights, a number might plausibly be engaged when force is used in the course of MSOs. Most of the instruments under examination protect the peaceful enjoyment of possessions, a right that may be violated when property is damaged by force used by a State in the course of an MSO. With respect to harm to individuals, all of the instruments protect the right to life. This applies not only when the death of an individual is intended or expected, but also applies when force is used that leads to unintentional killing. It may even apply in some circumstances when an individual does not die, but instead suffers serious injury. In addition, the right to liberty and security of the person under the ICCPR has been interpreted by the HRC as applying where injury is caused both to detainees and non-detainees.

The chapter proceeded to examine, in detail, the obligations that flow, in particular, from the right to life, bearing in mind the issues discussed in Chapter Three with respect to the extraterritorial applicability of human rights treaty obligations to the use of force alone. These included the requirement to use only that force which is necessary and proportionate, including an obligation

only to resort to forceful means once other options have been exhausted. To a large extent, this mirrors the position under the law of the sea, a conclusion that is perhaps unsurprising given the likely influence of human rights law on the development of the law of the sea. Indeed, only in narrow circumstances might IHRL be more restrictive in the actual conduct of MSOs, namely with respect to the arguable requirement under IHRL to take into account the underlying reason for interdicting a vessel when deciding whether the use of force is proportionate to that aim.

However, IHRL imposes a range of obligations that go beyond the requirements of the law of the sea. First, force must be authorised and regulated by law. Although authority might arguably derive from international law, the detailed regulation required under IHRL can only plausibly be found in domestic provisions. Second, IHRL requires that MSOs be planned and resourced so as to minimise risk to life. The obligations on States with respect to resourcing are limited to only those measures that are realistic, reasonable and proportionate, this nevertheless imposes obligations on States well before force is actually used. Therefore, while force might be used consistently with the requirements of necessity and proportionality (and hence probably consistent with the requirements of the law of the sea) any resulting death might nevertheless violate the right to life if the operation could have been better planned, or conducted by safer means. Third, individuals conducting MSOs must be adequately trained, noting, in particular, the requirement to train military personnel conducting MSOs to use force according to law-enforcement standards. Finally, IHRL imposes requirements following the use of force to provide medical aid and to notify the relatives of casualties, as well as to investigate potential violations of the right to life and to hold those responsible to account. It is clear, therefore, that IHRL entails a number of obligations that do not exist under the law of the sea, notwithstanding the difficulty with which some of the requirements may be met in practice.

5. Deprivation of Liberty

5.1. Introduction

Several different human rights may be engaged when individuals are deprived of their liberty in the course of maritime security operations (MSOs). The most obvious of these is the right to liberty and security of the person.¹ However, individuals deprived of their liberty also enjoy a range of rights relating to their treatment. As well as the right to life,² detainees benefit from the prohibition of torture and inhuman or degrading treatment or punishment,³ and from the prohibition of slavery and forced labour.⁴ The International Covenant on Civil and Political Rights (ICCPR) and American Convention on Human Rights (ACHR) further specify the right of 'persons deprived of their liberty' to 'be treated [with humanity and] with respect for the inherent dignity of the human person.'⁵

Other rights may also be relevant to the treatment of individuals deprived of their liberty, including the freedoms of thought, conscience and religion;⁶ of expression;⁷ and of assembly and association.⁸ Where individuals are subsequently tried, further rights will apply. Most importantly, they will enjoy the

¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 9; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 5; American Convention on Human Rights: 'Pact of San José, Costa Rica' (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 144 (ACHR) art 7; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (ACHPR) art 6.

² ICCPR (n 1) art 6; ECHR (n 1) art 2, ACHR (n 1) art 4; ACHPR (n 1) art 4.

³ ICCPR (n 1) art 7; ECHR (n 1) art 3; ACHR (n 1) art 5; ACHPR (n 1) art 5; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 113 (CAT) arts 2–5, 16.

⁴ ICCPR (n 1) art 8; ECHR (n 1) art 4, ACHR (n 1) art 6; ACHPR (n 1) art 5.

⁵ ICCPR (n 1) art 10, ACHR (n 1) art 5(2). The words in brackets are in the relevant provision of the ICCPR, but not the ACHR.

⁶ ICCPR (n 1) art 18; ECHR (n 1) art 9, ACHR (n 1) arts 12–13; ACHPR (n 1) art 8.

⁷ ICCPR (n 1) arts 19–20; ECHR (n 1) art 10, ACHR (n 1) art 13; ACHPR (n 1) art 9.

⁸ ICCPR (n 1) arts 21–22; ECHR (n 1) art 11, ACHR (n 1) arts 15–16; ACHPR (n 1) arts 10–11.

right to a fair trial.⁹ In addition, any sentence, as well as being constrained by general rights concerning the treatment of detainees, may be subject to specific provisions concerning the availability of capital punishment.¹⁰ Finally, where a State seeks to transfer detainees to another State, or to release detainees in circumstances that may place them at risk of their rights being violated, particular human rights obligations may be engaged. In addition to explicit provisions concerning the prohibition of *non-refoulement*, human rights instruments have been interpreted in some circumstances so as to prohibit actions that give rise to a foreseeable risk that an individual's rights will be violated.

The transfer of individuals, particularly the prohibition on *non-refoulement*, is the subject of Chapter Seven. Of the other rights noted above, this chapter focuses specifically on the right to liberty and security of the person, which raises issues of particular significance in the context of MSOs. Questions of applicability aside, the application of the others with respect to individuals deprived of their liberty at sea will be largely the same as on land. Therefore, although some of these rights, particularly those relating to the treatment of detainees and the right to a fair trial, are of considerable importance with respect to the application of international human rights law (IHRL) to the deprivation of liberty in general,¹¹ and therefore to MSOs in practice,¹² this thesis does not examine them further.

As this chapter explains, the right to liberty and security of the person requires that detention not be arbitrary, meaning first and foremost that individuals may be deprived of their liberty only where there exists a legal basis to do so and according to grounds and procedures established by law. However, even where an individual is *lawfully* deprived of his or her liberty, the deprivation must conform to additional standards of non-arbitrariness, including necessity and

⁹ ICCPR (n 1) art 14; ECHR (n 1) art 6, ACHR (n 1) art 8; ACHPR (n 1) art 7.

¹⁰ ICCPR (n 1) art 6(2)–(6); ACHR (n 1) art 4(2)–(6); Protocol 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 28 April 1983, entered into force 1 March 1985) ETS 114 art 1.

¹¹ On the prohibition of torture and other ill-treatment in the context of detainees, see, for example, Nigel S Rodley and Matt Pollard, *The Treatment of Prisoners Under International Law* (3rd edn, OUP 2009) 45–81. On conditions of imprisonment or detention, see *ibid* 379–426.

¹² On the right to a fair trial with respect to individuals detained in connection with piracy, see Anna Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (Brill Nijhoff 2014) 412–33.

proportionality. Depending on the instrument in question, permitted grounds and specific procedural requirements may also be set out in express terms, or may have been developed through subsequent practice.

The chapter begins by examining practice relating to deprivation of liberty in the course of MSOs. It does so principally by introducing three European Court of Human Rights (ECtHR) cases, in which the right to liberty has been applied specifically to instances of detention at sea: *Rigopoulos v Spain*,¹³ *Medvedyev and others v France*,¹⁴ and *Vassis and others v France*.¹⁵ The facts of these cases are presented as examples of detention practice during MSOs and, as such, demonstrate the key issues engaged in the application of IHRL. They also place into context the subsequent references made in this chapter to the three cases.

Next, the chapter briefly sets out how and where deprivation of liberty features in the law of the sea, with respect to either authorisation or regulation. This is done through an examination of relevant provisions of the UN Convention on the Law of the Sea (UNCLOS),¹⁶ as well as other key instruments. The law presented is not intended to be exhaustive, but rather to illustrate key points. As will be explained, although the law of the sea authorises the deprivation of liberty in some situations, and further recognises the right of a State in certain circumstances to take action that may result in deprivation of liberty, it does relatively little in protecting the rights of those affected.

The chapter finally turns to the application of the right to liberty and security of the person to the deprivation of liberty in the course of MSOs. In doing so, it first provides a short recap of the relevant points identified in Chapters Two and Three relating to the applicability of IHRL, before setting out the basic legal framework, including the relevant provisions of the instruments under consideration and a comparison of their language and structure. It then considers four key issues in the context of MSOs: the circumstances that engage the right to liberty; the requirement of lawfulness; the prohibition of

¹³ *Rigopoulos v Spain* ECHR 1999-II 435. The decision is not paginated or paragraph-numbered.

¹⁴ *Medvedyev and Others v France* ECHR 2010.

¹⁵ *Vassis and Others v France* App No 62736/09 (ECtHR, 27 June 2013).

¹⁶ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS)

arbitrary deprivation of liberty, including permitted grounds; and procedural rights and obligations.

5.2. Notable practice relating to deprivation of liberty

Considering, first, *Rigopoulos v Spain*, the case concerned the 1995 interdiction of the Panamanian-flagged merchant vessel *Archangelos* by a Spanish customs inspection department vessel *Petrel I*. Spain had obtained authorisation from Panama to board and search the *Archangelos*, which was carrying a cargo of cocaine, under the terms of Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention).¹⁷ The *Archangelos* was boarded on 23 January 1995, while on the high seas about three thousand miles from the Canary Islands. However, some of the crew members resisted and it was not until 26 January, following an exchange of fire, that they surrendered to the Spanish officials. In the meantime, a search of the vessel resulted in the seizure of a large quantity of cocaine and the applicant in the case, the Greek master of the *Archangelos*,

¹⁷ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988, entered into force 11 November 1990) 1582 UNTS 165. The key provisions, arts 17(2)–(3), read:

3. A Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law, and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures in regard to that vessel.
4. In accordance with paragraph 3 or in accordance with treaties in force between them or in accordance with any agreement or arrangement otherwise reached between those Parties, the flag State may authorize the requesting State to, *inter alia*:
 - a) Board the vessel;
 - b) Search the vessel;
 - c) If evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.

had been transferred to the *Petrel I*.¹⁸ The *Petrel I* then proceeded to escort the *Archangelos* to the Canary Islands, where they arrived on 7 February.¹⁹

On 26 January, the Central Investigating Court in Spain, noting that the vessels would not reach the Canary Islands in time to meet the seventy-two-hour limit within which detainees were required, under Spanish law, to be brought before judicial authorities, exceptionally authorised the crew's continued detention. It did so in light of the 'special circumstances', including the vessels' location and the large quantity of drugs that had been seized. The government said that the crew had been first informed of their detention on 24 January, were informed of the Court's decision on 27 January and asked for details of people, including lawyers, they wished to be informed. The applicant claimed that it was not until 2 February that he was notified of the Court's decision, and he complained that he had had no contact with the investigating judge during the voyage to the Canary Islands, only being properly informed of his rights once they arrived. He also noted that he had not had the assistance of an interpreter and had no lawyer present on the *Petrel I*. On either account, the applicant and other members of the crew were flown to Madrid on 7 February, and it was not until 8 February that they were brought before the relevant judicial authority and questioned with the assistance of both lawyers and interpreters.²⁰

Turning, next, to *Medvedyev and others v France*, that case concerned the detention in 2002 of the crew of the *Winner*, a merchant ship registered in Cambodia, by French naval forces. The *Winner* had been suspected by *l'Office Central de Répression du Trafic Illicite des Stupéfiants* (OCRTIS—the French Central Office Against Illegal Drug Trafficking) of carrying a large quantity of drugs for onward transfer to Europe.²¹ In light of this, the French authorities had asked for, and received, permission from Cambodia to interdict the *Winner*.²² The operation was assigned to a French naval frigate, the *Lieutenant de*

¹⁸ It is unclear from the case report what was done with the other thirteen crew members of the *Archangelos*.

¹⁹ *Rigopoulos* (n 13).

²⁰ *ibid*.

²¹ *Medvedyev* (n 14) [9].

²² *ibid* [10].

vaisseau Le Hénaff, in which was embarked a French navy commando unit, as well as experts from OCRTIS.²³

On 13 June 2002, the frigate located the *Winner* off Cape Verde and, having used warning shots, followed by fire directed at the vessel, eventually persuaded the *Winner* to stop and allow a boarding to be conducted.²⁴ While the *Winner* had been evading the frigate, its crew had been seen jettisoning a number of packages, one of which was recovered and found to contain a large quantity of cocaine. Following a search of the vessel,²⁵ and under orders of the French authorities, a tug was despatched to tow the *Winner* to Brest, escorted by a different French naval frigate, the *Commandant Bouan*. However, because of damage to the *Winner* and poor weather, they could proceed at no more than five knots,²⁶ and it was not until 26 June that the *Winner* arrived in Brest.²⁷ The crew of the *Winner* remained on board during the voyage; according to the French government, they were confined to their quarters at first, but were subsequently allowed to move around the ship during the remainder of the voyage, albeit under supervision. However, the crew claimed that ‘the coercive measures were maintained throughout’.²⁸

During the voyage, the French authorities had commenced an investigation into the *Winner*’s involvement in narcotics-related activities. However, it was only on 24 June that an investigation was opened by the public prosecutor’s office and two investigating judges appointed.²⁹ When the *Winner* arrived in Brest on 26 June, the crew were handed to police, acting under the authority of the investigating judges, told that they were being placed in custody and informed of their rights.³⁰ That same day, the crew members were brought before an

²³ *ibid* [12].

²⁴ *ibid* [13].

²⁵ In the course of the search one of the *Winner*’s crew members was fatally wounded when one of the commandos fired a warning shot to try and compel him to open a compartment. He later died in hospital. However, this aspect of the incident was not the subject of the case at the ECtHR. *ibid*.

²⁶ *ibid* [14].

²⁷ *ibid* [18].

²⁸ *ibid* [15].

²⁹ *ibid* [17].

³⁰ *ibid* [18].

investigating judge; they were again brought before an investigating judge the next day and subsequently each was charged on either 28 or 29 June.³¹

Finally, the case of *Vassis and others v France* concerned the 2008 interdiction of a suspected drug-smuggling vessel by French naval forces, again acting on the request of OCRTIS. The vessel in question, the *Junior*, was again Panamanian-flagged, and the operation was again carried out with the consent of the Panamanian authorities.³² The *Junior* was intercepted by the French navy ship *Tonnerre* on 7 February 2008 about three hundred kilometres southwest of Guinea, at which point crew members of the *Junior* were seen jettisoning a package, which was recovered and found to contain a large quantity of cocaine. The *Junior* was boarded and then searched once permission was given by Panama to do so on 8 February,³³ then, on 9 February, agreement was given by Panama to transfer jurisdiction over the case to France and, on 10 February, the *Junior* was diverted to Brest, initially escorted by *Tonnerre*, before being handed over to another French naval vessel, the *Ravi*.³⁴

Although not stated so explicitly in the judgment, it seems that the crew remained on board the *Junior* throughout the interdiction and subsequent voyage to Brest. However, on 14 February, at the same time that further narcotics were found on board, the crew was placed under guard of twelve marines.³⁵ The *Junior* arrived in Brest on 25 February and its crew handed over to the Brest public prosecutor. The crew was then placed in police custody, which was extended on 26 February for a further twenty-four hours by a public prosecutor after having interviewed each crew member. Their custody was again extended on 27 February, from which point they continued to be subject to the French justice system until their eventual trial several years later.³⁶

These three cases illustrate a number of key issues with respect to detention in the course of MSOs, at least so far as is relevant to the application of IHRL.

³¹ *ibid* [19].

³² *Vassis* (n 15) [5], [8]–[9].

³³ The judgment mentions seizures being made at this point, but provides no further details. Similarly, it is unclear exactly what was being done with respect to the crew, except that their identities had been checked and that they were presumably still on board the *Junior*. *ibid* [7].

³⁴ *ibid* [6]–[11].

³⁵ *ibid* [11].

³⁶ *ibid* [12]–[23].

First, the legal basis for detention can be complex or unclear, involving both international and domestic law. This is discussed further below, but, in each of the three cases, the application of the law was complicated by the fact that the State authorities were exercising jurisdiction over a foreign-flagged vessel on the high seas, relying on consent granted either under a pre-existing treaty framework (the Vienna Convention in the case of *Rigopoulos*) or on an ad hoc basis (as was the case in *Medvedyev* and *Vassis*).

Second, a range of measures may be taken in practice to control a vessel and its crew. The cases illustrate the range of situations involved: either the vessel itself, or individual crew members, may be subject to control on the part of the interdicting ship; the vessel may be escorted or placed under tow; the crew members may remain on board their own vessel, or be transferred onto the interdicting ship; and they may be subject to additional restrictions on their freedom. These restrictions must also be understood in light of the fact that individuals in a ship at sea will already be restricted in their freedom, on a practical level, in light of their inability to leave the vessel. As a result, as will be discussed below, it may be unclear whether, and at what point, the control exerted by a State over an individual amounts to a deprivation of liberty.

Third, the distance at which MSOs may be conducted from the interdicting State's territory means that there can be a substantial delay before individuals are brought before judicial authorities. As discussed below, a range of options may plausibly be available to a State in this situation, such as the commitment of additional resources (such as aircraft or faster ships) to expedite the journey, transfer to the authorities of a closer State, or the use of technology to connect individuals remotely to judges located in a State's territory. Nevertheless, delay beyond that which is normally expected in the course of domestic law enforcement may be inevitable, and the question arises whether a particular measure to reduce delay is required of the State irrespective of the cost or difficulty involved.

Finally, noting that individuals detained in MSOs may be of any nationality, the absence of an interpreter on board the interdicting ship may present a practical challenge to any procedure administered while still at sea. Likewise, the provision of legal advice may be difficult or impossible; even if it can be

provided remotely, it may be difficult in practice to allow individuals to communicate in sufficient detail such that they can participate effectively in any legal process.

The three cases all concern counter-narcotics operations; however, the issues engaged are representative of those that may be encountered whenever individuals are detained in the course of MSOs. An additional layer of complication, not encountered in these cases, is involved in the particular context of counter-piracy operations. In recent years these have been conducted by multinational forces, responding, in particular, to the rise of piracy off the coast of Somalia. For a variety of reasons, the States involved have often been reluctant to prosecute pirates in their own courts, and have therefore developed a practice of transferring detained pirates to regional States, such as Kenya, for prosecution.³⁷ The IHRL issues raised by the transfer of detainees is discussed in Chapter Seven; however, with respect to the detention of suspected pirates, the practice means that such individuals may be detained without any definite plan for their onward transfer or prosecution. The State involved may negotiate a transfer, elect to mount its own prosecution, or decide, either immediately or at some later point, simply to release the suspect. This practice exacerbates the issues encountered in the detention of individuals in the course MSOs more generally.

5.3. Deprivation of liberty in the law of the sea

Deprivation of liberty is specifically permitted in certain circumstances under the law of the sea. Relevant provisions may relate either to the individuals or to ships, noting, as discussed below, that action taken against the latter may necessarily result in the deprivation of liberty of those on board. Considering UNCLOS, Articles 105 and 109 authorise the arrest of both individuals and ships, in connection with piracy and unauthorised broadcasting respectively. Under Article 105, 'On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.' Under Article 109(4), certain States

³⁷ For a detailed account of the practice of the EU's counter-piracy forces, see Petrig (n 12) 82–126.

with one of the jurisdictional links defined in Article 109(3),³⁸ may, on the high seas, 'arrest any person or ship engaged in unauthorized broadcasting and seize the broadcasting apparatus.' Furthermore, Articles 213–222 UNCLOS provide for the enforcement of the rules related to prevention, reduction and control of maritime pollution; Article 220, in particular, provides for the inspection and detention by a coastal State of vessels in its waters suspected of violating relevant laws and regulations relating to pollution.

In addition to these explicit permissions to arrest individuals or vessels, Article 110 UNCLOS sets out the right of warships and other authorised vessels to visit foreign ships reasonably suspected of: being engaged in piracy, the slave trade or unauthorized broadcasting;³⁹ being without nationality; or despite flying a foreign flag, in fact being of the same nationality as the visiting ship.⁴⁰ In exercise of this right, the visiting ship may conduct an inspection 'to verify the ship's right to fly its flag.'⁴¹ Although there is no express right to arrest the ship or individuals on board, the conduct of the inspection might, as discussed below, involve, a deprivation of liberty.

Further provisions authorising deprivation of liberty may be found in other multilateral and bilateral treaties. For example, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, as amended by the 2005 Protocol,⁴² makes express provision for the granting of permission by a flag State for another State to exercise jurisdiction over its flagged vessels, in connection with certain specified unlawful acts connected to

³⁸ Art 109(3) states that:

Any person engaged in unauthorized broadcasting may be prosecuted before the court of: (a) the flag State of the ship; (b) the State of registry of the installation; (c) the State of which the person is a national; (d) any State where the transmissions can be received; or (e) any State where authorized radio communication is suffering interference.

UNCLOS (n 16) art 109(3).

³⁹ Subject to the requirement for a jurisdictional link as defined in art 109.

⁴⁰ UNCLOS (n 16) art 110(1).

⁴¹ *ibid* art 110(2).

⁴² Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (concluded 10 March 1988, entered into force 1 March 1992) 1678 UNTS 201 as amended by the Protocol of 2005 (adopted 1 November 2005, entered into force 28 July 2010) IMO Doc LEG/CONF.15/21 (SUA).

endangering ships.⁴³ Such permission may include authorisation to 'detain the ship, cargo and persons on board pending receipt of disposition instructions from the flag State.'⁴⁴ Similar provisions are contained in Article 17 Vienna Convention, which allow for a flag State to authorise another State to board and search one of its flagged vessels suspected of being engaged in the illicit traffic in drugs, and '[i]f evidence of involvement in illicit traffic is found, [to] take appropriate action with respect to the vessel, persons and cargo on board.'⁴⁵

Authorisation of measures that may result in deprivation of liberty at sea may also be found in UN Security Council Resolutions. For example, UN Security Council Resolution (UNSCR) 1846 authorized States cooperating with the Transitional Federal Government of Somalia to '[u]se, within the territorial waters of Somalia, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery at sea.'⁴⁶ The effect of this was to extend the application of Article 105 and 110, including the authorisation to detain ships and individuals set out above, to Somalia's territorial sea. Similarly, UNSCR 2182, for example, sets forth an inspection regime for vessels suspected of violating either the embargo on arms shipments to Somalia or the ban on exporting charcoal from Somalia.⁴⁷ Like Article 110 UNCLOS, although it does not specifically authorise the arrest of ships or individuals, the process of inspection may require the temporary deprivation of liberty of those on board.

As well as specific authorisations for the arrest of vessels or individuals, or of other activities that may involve the deprivation of liberty, the law of sea contemplates the exercise by States of jurisdiction, albeit limited in some cases, over certain vessels. Beyond the territorial sea, the basic rule is that ships are subject to the exclusive jurisdiction of their flag State, except where provided otherwise by treaty.⁴⁸ Within the territorial sea, Articles 27 and 28 UNCLOS

⁴³ *ibid* art 8*bis*.

⁴⁴ *ibid* art 8*bis* (6).

⁴⁵ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (n 17) art 17(4).

⁴⁶ UNSC Res 1846 (2 December 2008) UN Doc S/RES/1846 para 10.

⁴⁷ UNSC Res 2182 (24 October 2014) UN Doc S/RES/2182 paras 11–22. The right to inspect a foreign vessel is dependent on making 'good-faith efforts' to seek the consent of the flag State. *ibid* para 16.

⁴⁸ UNCLOS (n 16) art 92(1).

provide for the circumstances in which a coastal State may exercise its criminal and civil jurisdiction, respectively, over foreign ships. The right of a coastal State to exercise jurisdiction is extended in more limited sets of circumstances to the contiguous zone by Article 33, and by Article 73 to the exclusive economic zone. Where a State exercises its jurisdiction in accordance with these rules, its actions may involve, either by design or consequence, deprivation of liberty.

Turning to the protection of the rights of those who are deprived of their liberty, the law of the sea does not contain a single set of obligations that apply in every instance. Rather, particular authorisations are accompanied by their own provisions, which vary in their content, but, on the whole, are relatively scant in detail. Article 27(3) UNCLOS requires a coastal State exercising its criminal jurisdiction over a foreign vessel in its territorial sea to 'notify a diplomatic agent or consular officer of the flag State' if requested to do so by the master, and to 'facilitate contact between such agent or officer and the ship's crew.' Under Article 73(2), a vessel or crew arrested in connection with prohibited activities in the exclusive economic zone 'shall be promptly released upon the posting of reasonable bond or other security'; and, under Article 73(4), a State arresting a foreign vessel in its exclusive economic zone 'shall promptly notify the flag State'. More detailed provisions are contained in Articles 223–233 UNCLOS, but relate only to the enforcement of rules to prevent, reduce and control pollution. These include obligations not to 'delay a foreign vessel longer than is essential'⁴⁹ and not to 'discriminate in form or in fact against vessels of any other State',⁵⁰ as well as procedural provisions relating to subsequent judicial proceedings.⁵¹

Considering sourced of authorisation other than UNCLOS, SUA contains a number of 'safeguards', including the obligation to 'ensure that all persons on board [a vessel against which specified measures are taken] are treated in a manner which preserves their basic human dignity, and in compliance with the applicable provisions of international law, including international human rights law'.⁵² It also requires that

⁴⁹ *ibid* art 226(1)(a).

⁵⁰ *ibid* art 227.

⁵¹ *ibid* art 228.

⁵² SUA (n 42) art 8*bis* (10)(a)(ii).

Any person who is taken into custody, or regarding whom any other measures are taken or proceedings are being carried out pursuant to this Convention, shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law.⁵³

However, illustrating the inconsistency in the law, the Vienna Convention does not contain equivalent provisions, instead only obliging a State (consistent with other provisions of SUA) to 'take due account of the need not to endanger the safety of life at sea, the security of the vessel and the cargo or to prejudice the commercial and legal interests of the flag State or any other interested State.'⁵⁴

As this brief survey illustrates, although the law of the sea directly or indirectly permits deprivation of liberty in a wide range of circumstances, it is relatively scant in setting out the rights of individuals affected. Different authorisations are accompanied by widely varying obligations; and, although SUA, for example, does at least oblige States to protect the rights of those deprived of their liberty, it contains little detail. Instead, it expressly defers to other bodies of law, including international human rights law, as the source of concrete obligations.

5.4. The application of the right to liberty and security of the person to the deprivation of liberty in MSOs

5.4.1. Particular applicability issues

Before considering the application of the right to liberty and security of the person to deprivation of liberty in MSOs, it is helpful to recap the main points of relevance from Chapters Two and Three concerning the applicability, generally, of IHRL to MSOs. It will be recalled that each of the instruments under consideration will usually apply throughout a State's territory, including its territorial sea, as well as in its internal and archipelagic waters. Hence, when a State conducts an MSO in one of these zones, relevant rights, including the right to liberty and security of the person, may be engaged.

With respect to the extraterritorial applicability of the instruments under consideration, i.e., in areas beyond a State's own territorial sea, the situation is

⁵³ *ibid* art 10(2).

⁵⁴ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (n 17) art 17(5).

more complicated. It is uncontroversial that the treaties under consideration apply in a State's own flagged vessels, which will almost certainly include vessels used by a State to conduct MSOs. Therefore, where individuals are deprived of their liberty on board such vessels in these areas, or are transferred to them having already been deprived of their liberty, the State's obligations under the human rights treaties under consideration will apply.

Outside these scenarios, applicability is most likely to arise from the exercise by a State agent of authority and control over an individual. Deprivation of liberty is the archetypical example of State agent authority and control; therefore, human rights obligations are likely to be engaged on this basis where individuals are deprived of their liberty in the course of MSOs, notwithstanding uncertainty, as discussed below, as to exactly what circumstances will reach that threshold. This is consistent with the practice of the ECtHR in *Medvedyev*, in which it held the ECHR to have applied from the point at which the *Winner* was intercepted, and therefore to at least as long a period as it considered the crew members to have been deprived of their liberty. With this in mind, while noting the various points of contention discussed in Chapter Three as to the extraterritorial applicability of the treaties under consideration, this chapter proceeds on the basis that the human rights obligations in question will apply, as a minimum, at the point at which individuals are considered to have been deprived of their liberty, wherever that should occur.

5.4.2. Legal framework

Each of the four instruments under examination contains a right protecting individuals' liberty and personal security.⁵⁵ The relevant provision of the ICCPR is Article 9, which states:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

⁵⁵ On the right to liberty, generally, see Sangeeta Shah, 'Detention and Trial' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, OUP 2014) 259–69; Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (OUP 2009) 443–50.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

The equivalent provision of the ECHR, Article 5, is as follows:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - (a) the lawful detention of a person after conviction by a competent court;
 - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;

- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
- 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.
- 3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
- 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
- 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 7 ACHR is as follows:

- 1. Every person has the right to personal liberty and security.
- 2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
- 3. No one shall be subject to arbitrary arrest or imprisonment.
- 4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
- 5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
- 6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws

provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

7. No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support.

Finally, Article 6 of the African Charter on Human and Peoples' Rights (ACHPR), which eschews any detailed provisions concerning procedure, is as follows:

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

As noted in Chapter Four, the Human Rights Committee's (HRC's) interpretation of the ICCPR is unique amongst the four instruments in considering the rights to liberty and security of the person as two distinct rights, the latter protecting individuals, both those who have been detained and those who have not, from the 'intentional infliction of bodily or mental injury'.⁵⁶ So far as the practice relating to the other instruments is concerned, the reference to security of the person carries no independent meaning.⁵⁷ As Schabas notes,

⁵⁶ With respect to art 9 ICCPR, the practice of the HRC has developed to treat the 'right to security of person' as separate and distinct from the 'right to liberty of person'. The terminology used for the two rights is that used by the HRC in General Comment 35. UN Human Rights Committee, 'General Comment No 35' (16 December 2014) UN Doc CCPR/C/GC/35 (HRC General Comment 35) paras 3, 9. See also Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (3rd edn, OUP 2013) paras 11.03–11.07. In General Comment 35, the HRC summarised the position as being that, 'The right to security of person protects individuals against intentional infliction of bodily or mental injury, regardless of whether the victim is detained or non-detained.' HRC General Comment 35 (n 56) para 9. In particular, as well as prohibiting the infliction of unjustifiable bodily injury by State agents, the right to security of person imposes positive obligations on States 'to protect individuals from foreseeable threats to life or bodily integrity proceeding from any governmental or private actors.' *ibid* para 9 (citing 1560/2007, *Marcellana and Gumanoy v. Philippines*, para. 7.7).

⁵⁷ While the European Commission and ECtHR have both referred to separate rights of liberty and security of person, there appears little if any meaningful distinction. William A Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 228–29. At most, where a separate meaning has

the practice of the European Commission and ECtHR in interpreting Article 5 ECHR has been to focus ‘almost exclusively on “liberty” and [to give] no distinct or autonomous meaning ... to “security of person”’.⁵⁸ Given the focus of this Chapter on deprivation of liberty, to the extent that Article 9 ICCPR contains a separate right of security of person, that aspect of the right to liberty and security of person will not be discussed here. For the sake of simplicity, the term ‘right to liberty’ will be used throughout this chapter with respect to each of the four provisions.

Comparing the four provisions, each first states the existence of a right to liberty in general terms, before proceeding to set out the circumstances in which individuals may nevertheless be deprived of it. They all contain a requirement that the grounds for detention be lawful, albeit that the textual approach differs between the instruments. Whereas the other instruments require that the grounds, or reasons,⁵⁹ for detention be established by, or previously laid down in, law, Article 5(1) ECHR instead enumerates specific grounds, each containing a requirement that the act or order by which an individual is deprived of his liberty is itself ‘lawful’.⁶⁰ Each instrument also incorporates a requirement that either the procedure,⁶¹ or the conditions,⁶² for detention be prescribed or established by, or previously laid down in, law.

Turning to the grounds for detention, the textual approach between the ECHR and the other instruments is again different. The ICCPR, ACHR and ACHPR each prohibit ‘arbitrary’ arrest or detention,⁶³ whereas Article 5 ECHR does not. Instead, it contains an enumeration of circumstances in which arrest or detention may be such as not to violate the right to liberty. Nevertheless, it is

been attached to security of person under the ECHR, it has been used to refer to procedural obligations related to protection from arbitrary detention. Rhonda Powell, ‘The Right to Security of Person in European Court of Human Rights Jurisprudence’ (2007) 6 Eur Human Rights L Rev 649, 655. Although the right to security of the person under art 7 ACHR has not been applied as a separate right, it has been argued that it nevertheless ought to be. Thomas M Antkowiak and Alejandra Gonza, *The American Convention on Human Rights: Essential Rights* (OUP 2017) 146–47.

⁵⁸ Schabas (n 57) 228.

⁵⁹ For simplicity, these will be referred to hereafter simply as ‘grounds’.

⁶⁰ ECHR (n 1) art 5(1)(a)–(f).

⁶¹ In the case of the ICCPR and ECHR.

⁶² In the case of the ACHR and ACHPR.

⁶³ Referred to as ‘imprisonment’ in ACHR (n 1) art 7(3).

well established in the jurisprudence relating to Article 5 that it contains—indeed, is arguably premised upon—protection from arbitrary deprivation of liberty.⁶⁴

In the case of the ICCPR, ECHR and ACHR, but not the ACHPR, all of the relevant Articles proceed to set out specific procedural requirements, dealing mainly with the right of an individual to be informed of the reasons for his or her detention, and the right to have access to, and to be brought promptly before, a competent court. These requirements are discussed in further detail below.

From this summary, and assuming the applicability of the right in question, the issues engaged in the application of the right to liberty can be separated into four areas: first, whether a particular situation amounts to a deprivation of liberty such as to engage the right; second, whether a particular deprivation of liberty meets the requirement of legality; third, whether the deprivation of liberty is arbitrary and, in the case of the ECHR, falls within one of the prescribed grounds; and, finally, whether the procedural requirements of the right have been complied with. The remainder of this section considers these issues in the specific context of deprivation of liberty in the course of MSOs.

5.4.3. Circumstances that engage the right to liberty

As described above, in the course of MSOs individuals may be subject to a range of measures that affect their freedom to a greater or lesser extent. These include both measures that are taken against a vessel as a whole, such as when it is escorted or towed to a particular port, as well as those whereby individuals are subject to individual restrictions on their liberty, such as when they are placed under guard or held in a particular location within a vessel. Furthermore, these measures may or may not be characterised by the State in question as ‘detention’.

In general, the applicability of the right to liberty is premised on substance rather than form, depending on an objective determination as to whether an individual has, in fact, been deprived of liberty. The articles refer variously to arrest,

⁶⁴ Schabas (n 57) 231–32. The textual approach in art 5 ECHR is analogous to that adopted in the drafting of art 2 ECHR; both eschew express reference to arbitrariness for an enumeration of circumstances in which actions that would normally violate the right in question may nevertheless be permitted.

detention, imprisonment and deprivation of liberty in setting out different substantive and procedural aspects of the right to liberty. Although this might be taken to imply a distinction in the meaning of—and obligations associated with—each term, in practice this is not the case. Fundamentally, the right to liberty is to be construed broadly as being engaged by any deprivation of liberty and not, in particular, just to individuals subject to criminal charges. The HRC has stated that Article 9(1) ICCPR ‘is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.’⁶⁵ This is not an exhaustive list, but rather emphasizes the point that it is the fact of deprivation of liberty that is relevant, rather than the character of that deprivation. The HRC goes on to state that, while certain provisions of Article 9 are, by nature, ‘only applicable to persons against whom criminal charges are brought’, the rest ‘appl[y] to all persons deprived of their liberty by arrest or detention.’⁶⁶ Consistent with the approach of the HRC, Article 5 ECHR and Article 7 ACHR have been applied in numerous contexts outside of the context of the criminal process.⁶⁷ As for the ICCPR, the relevant question is whether a person has, in fact, been deprived of their liberty.

In the context of MSOs, it will not necessarily matter whether a State intends to return an individual to its own territory for prosecution, to transfer him or her to another State, or subsequently to release them; if the control over them amounts to a deprivation of liberty (the criteria for which are discussed below) then the right will be engaged. Similarly, the applicability of the right to liberty

⁶⁵ UN Human Rights Committee, ‘General Comment No 8’ (30 June 1982) UN Doc HRI/GEN/1/Rev.1, 8 (HRC General Comment 8) para 1.

⁶⁶ *ibid* para 1. The HRC indicated the provisions applicable only to those subject to criminal charges to be ‘part of paragraph 2 and the whole of paragraph 3’. The HRC reiterated this view in HRC General Comment 35 (n 56) para 4.

⁶⁷ Schabas identifies examples including ‘the placement of persons in institutions for psychiatric care and social services, international zones in airports, interrogation in police stations, house arrest, confinement in an “open prison”, and crowd control efforts.’ Schabas (n 57) 227 (citations omitted). Similarly, Antkowiak and Gonza identify from the IACtHR’s jurisprudence instances of art 7 ACHR being applied in situations including ‘a military base, a customs facility, an airport detention center, a secret military detention site, police stations and vehicles, administrative offices of an intelligence agency, and a military hospital. ... The Court has even found violations for detentions in a church, in a mine, and “along the public roads” where individuals were forced to herd cattle’. Antkowiak and Gonza (n 57) 145–46.

will not depend on a particular step that might, or might not, have been taken in a State's domestic legal system to 'regularise' the detention of an individual. Such a step was, for example, taken in each of the cases whose facts are set out above; however, in each, the individuals concerned were subject to restrictions on their liberty before the domestic authorities of the State concerned formally detained them under domestic law. Furthermore, the fact that a State may not describe the situation of an individual as, for example, 'detention', 'custody' or 'imprisonment', is not determinative of the applicability of the right to liberty.

Having established that what matters is an objective determination as to whether an individual has been deprived of his or her liberty, the next step is to understand where the threshold in that determination lies in the context of MSOs. This is not a simple matter; as the ECtHR has stated, 'In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5 the starting-point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question'.⁶⁸ Nevertheless, some general observations can be made.

The right to liberty is essentially a *physical* concept, which the HRC has stated concerns 'freedom from confinement of the body, not a general freedom of action'.⁶⁹ Furthermore, not all restrictions on an individual's physical freedom will be sufficient to engage the right to liberty. In this respect, the right to liberty has been compared and contrasted with broader rights protecting freedom of movement. For instance, the HRC states that Article 9 ICCPR is engaged only by a 'more severe restriction of motion within a narrower space than mere interference with liberty of movement under article 12'.⁷⁰

It is clear, however, that the nature of the space in which a person is detained is not determinative. Hence, with respect to the distinction between restriction and deprivation of liberty, the ECtHR has made clear that, 'The difference...is merely one of degree or intensity, and not one of nature or substance'.⁷¹ This is

⁶⁸ *Medvedyev* (n 14) [73]. See also Schabas (n 57) 227.

⁶⁹ HRC General Comment 35 (n 56) para 3.

⁷⁰ *ibid* para 5. Art 12 concerns the more general freedom of movement.

⁷¹ *Medvedyev* (n 14) [73]. See also Schabas (n 57) 227.

reflected in the broad range of situations in which individuals have been determined to have been deprived of their liberty.⁷² Examples cited include not only situations that might typically be thought of in the context of detention, such as police custody and imprisonment, but also house arrest, and even confinement within particular areas of an airport. Furthermore, the location does not necessarily need to be fixed geographically. For example, the HRC considers that an individual may be deprived of his or her liberty when ‘being involuntarily transported.’⁷³ Similarly, the Inter-American Court of Human Rights (IACtHR) has found individuals to be deprived of their liberty when held in the trunk of a police vehicle.⁷⁴

Considering other factors, while the duration of a restriction on an individual’s freedom is relevant, it does not necessarily need to be prolonged in order to amount to a deprivation of liberty. Although a ‘negligible’ period of time will not suffice,⁷⁵ the ECtHR has, for example, found that individuals stopped by the police for less than thirty minutes in order to conduct a search were deprived of their liberty such as to engage Article 5.⁷⁶ Similarly, the IACtHR has held that ‘a detention, whether for a brief period, or a “delay,” even if merely for identification purposes, is a form of deprivation of physical liberty of the individual’.⁷⁷

Essential, however, to the deprivation of liberty is the absence of consent.⁷⁸ Specifically, ‘Individuals who go voluntarily to a police station to participate in an

⁷² These include ‘police custody, *arraigo*, remand detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalization, institutional custody of children and confinement to a restricted area of an airport, as well as being involuntarily transported.’ HRC General Comment 35 (n 56) para 5 (citations omitted). For relevant ECHR jurisprudence covering a similar set of circumstances, see *Schabas* (n 57) 227. For relevant ACHR jurisprudence covering a similar set of circumstances, see *Antkowiak and Gonza* (n 57) 145–46.

⁷³ HRC General Comment 35 (n 56) para 5.

⁷⁴ *Gómez Paquiyauri Brothers v Peru* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 110 (8 July 2004) [67(f)], [87].

⁷⁵ *Schabas* (n 57) 227.

⁷⁶ *Gillan and Quinton v the United Kingdom* ECHR 2010-I (extracts) [57].

⁷⁷ *Lysias Fleury et al v Haiti* (Merits and Reparations) Inter-American Court of Human Rights Series C No 236 (23 November 2011) [54]. See also *Torres Millacura et al v Argentina* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 229 (26 August 2011) [76].

⁷⁸ HRC General Comment 35 (n 56) para 6; *Schabas* (n 57) 227.

investigation, and who know that they are free to leave at any time, are not being deprived of their liberty.⁷⁹ What is required, therefore, is an element of coercion, such as, though not necessarily, liability to being charged with a criminal offence.⁸⁰

Turning to the application of these principles to MSOs,⁸¹ a broad range of restrictions may be placed on the freedom of the crew of an interdicted vessel. Considering the progress of a typical interdiction set out in Chapter One,⁸² at stages two and three, the interdicting ship brings the interdicted vessel under its control, by giving directions, potentially supported by both warnings and forceful measures, including non-disabling and disabling fire. Then, at stage four, the interdicting ship may send a boarding party to the interdicted vessel to conduct an inspection or search, during the course of which restrictions may be placed on the freedom of the crew to move freely on board. At some point, the boarding party may decide to detain certain members of the crew, holding them in a certain location either in the interdicted vessel or on board the interdicting ship. Finally, the interdicted vessel may be escorted, or towed, to another location, with the crew either still on board or transferred to the interdicting ship, and either with or without restrictions placed on the freedom of the crew members to move within whichever vessel they are situated. Notwithstanding that some of these measures are applied against a vessel as a whole, each may arguably amount to a direct or indirect restriction on the freedom of the individual crew members.

Some of these restrictions are essentially identical to those recognised as amounting to a deprivation of liberty in other contexts. In particular, where an individual is arrested and confined to a cell, or similarly small space, on board either the interdicting ship or interdicted vessel, then there is no sensible argument that he will not have been deprived of his liberty in the same way as if arrested and detained in similar circumstances on land.⁸³ Other situations

⁷⁹ HRC General Comment 35 (n 56) para 6.

⁸⁰ See, for example, *Gillan and Quinton v the United Kingdom* (n 76) [57]. See also Schabas (n 57) 226–27.

⁸¹ For discussion of the application of these principles, as they relate to the ICCPR and ECHR, in the context of counter-piracy operations, see Petrig (n 12) 156–67.

⁸² See above s 1.1.2.

⁸³ Petrig (n 12) 157–59.

recognised as being capable of amounting to a deprivation of liberty might be argued to be analogous. For example, the HRC's reference to 'involuntary transport' can be extended to transport via ship, either on an interdicted vessel or on the interdicting ship. Similarly, measures imposed against the crew of an interdicted vessel in the exercise of law-enforcement jurisdiction at sea are analogous to a police traffic stop, or brief detention for the purposes of identification, each of which have, as noted above, been recognised as amounting to a deprivation of liberty. Perhaps more helpful, however, is the guidance found in the limited jurisprudence specifically dealing with deprivation of liberty in the course of MSOs, particularly the ECtHR's decisions in *Medvedyev* and *Vassis*.

Two broad points can be identified from these cases. First, members of a crew may be deprived of their liberty when measures are imposed to control their vessel as a whole. In *Medvedyev*, the crew of the interdicted vessel, the *Winner*, remained on board throughout the interdiction and voyage to France, for which the *Winner* was placed under tow. Although the crew members were, for a period at least, confined to their cabins,⁸⁴ the Court found that they had been 'deprived of their liberty throughout the voyage as the ship's course was imposed by the French forces.'⁸⁵ Therefore, while the Court made reference to the additional restrictions placed upon the individual crew members,⁸⁶ it seems to have been the measures applied to the vessel as a whole that were decisive. Similarly, in *Vassis*, the Court, relying on *Medvedyev*, determined that the crew members had been deprived of their liberty from some point on the day that the

⁸⁴ *Medvedyev* (n 14) [15]. The government claimed that these restrictions had been relaxed at some point during the voyage, though this assertion was disputed by the applicants. *ibid* [74].

⁸⁵ *ibid* [74].

⁸⁶ *ibid* ('In the Court's opinion, while it is true that the applicants' movements prior to the boarding of the *Winner* were already confined to the physical boundaries of the ship, so that there was a *de facto* restriction on their freedom to come and go, it cannot be said, as the Government submitted, that the measures taken after the ship was boarded merely placed a restriction on their freedom of movement. The crew members were placed under the control of the French special forces and confined to their cabins during the voyage. True, the Government maintained that during the voyage the restrictions were relaxed. In the Court's view that does not alter the fact that the applicants were deprived of their liberty throughout the voyage as the ship's course was imposed by the French forces.').

vessel had first been boarded and throughout the voyage to France,⁸⁷ notwithstanding that it was only several days into the journey that the Court noted that the crew had been placed under guard.⁸⁸ Although the Court was less explicit in its reasoning than in *Medvedyev*, the Court's findings appear again to have been premised on deprivation of liberty arising from control over the interdicted vessel as a whole.

Second, it is not necessary that the restriction placed on a vessel as a whole be achieved through physical control, such as would be the case where it is placed under tow. Although, in *Medvedyev*, the *Winner* was, indeed, placed under tow, the Court did not refer specifically to this in its reasoning, but only to the fact that the vessel's course was imposed on the *Winner*, without reference to how this was achieved.⁸⁹ Furthermore, in *Vassis*, the interdicted vessel was not placed under tow, but diverted under escort.⁹⁰ Although the Court's reasoning in the latter case was not set out in clear terms, it follows from the fact that the Court considered the crew members to have been deprived of their liberty throughout the voyage, that the control exercised by the French forces was sufficient, despite the absence of a physical connection.

The decisions in *Medvedyev* and *Vassis* are not surprising given their consistency with the wider practice noted above, according to which a broad range of circumstances have been considered to amount to a deprivation of liberty in other contexts, and under which it is the fact that an individual's liberty has been curtailed, rather than any formal criteria, that matters. Considering the range of restrictions on freedom that may be imposed in the course of MSOs, both those measures taken against the vessel as a whole, and those taken against individual crew members, are likely to be capable of amounting to a deprivation of liberty. Indeed, although neither decision is entirely clear, in both *Medvedyev* and *Vassis* the period in which the crew members were considered to have been deprived of their liberty appears to have extended back to around the point where the vessel was first intercepted. Therefore, so long as the interdicted vessel, as a whole, is subject to the control of the interdicting ship,

⁸⁷ *Vassis* (n 15) [58].

⁸⁸ *ibid* [11].

⁸⁹ *Medvedyev* (n 14) [74].

⁹⁰ *Vassis* (n 15) [10].

the individual crew members may be considered to have been deprived of their liberty.

The only caveat to this conclusion, however, is that both *Medvedyev* and *Vassis* concerned periods of many days in which the interdicted vessel was subject to control. This raises the question whether a much shorter period, such as that required simply to conduct an inspection of the interdicted vessel, would still qualify. Bearing in mind that duration is a relevant factor, generally, it is at least possible that the answer should be yes. However, noting the ECtHR's recognition, highlighted above, of a police traffic-stop as amounting to a deprivation of liberty, analogous situations in MSOs ought arguably to qualify too.

Similarly, although *Medvedyev* and *Vassis* concerned deprivation of liberty following the boarding of the respective vessels, the same principles should apply at the point before a vessel is boarded, but when it is subject to the control of the interdicting ship, such as when it has stopped in preparation for boarding. This follows from the reasoning of the Court in *Medvedyev* that it was the imposition of the vessel's course that was material to the deprivation of liberty. In light of this, it is unsurprising that the fact of boarding does not, itself, appear to have been decisive, or necessarily even relevant. Furthermore, there can be no rational distinction between the imposition of a course and, for example, a requirement to remain station; both amount to the exercise of control over the movement of the vessel as a whole.

Notwithstanding that the decisions in *Medvedyev* and *Vassis* are directly relevant only to the application of Article 9 ECHR, they are likely to be influential in guiding the application the right to liberty, more broadly, in the course of MSOs. Consistent with the application of the law in other contexts, they provide support to the proposition that crew members of interdicted vessels will be deprived of their liberty not only in situations in which they are individually detained in a manner analogous to being held in a police cell, but in a broader range of circumstances. In light of this, it is submitted that this will include the situation when control is exerted over the interdicted vessel as a whole, such as when its course is dictated by the interdicting vessel. This will arguably be the case even where a vessel is stopped only briefly; however, the lack of practice

dealing specifically with such a situation leaves the situation less certain than with respect to measures imposed over a longer period of time.

5.4.4. The requirement of lawfulness

From the texts of the instruments, it is clear that lawfulness is an important concept in relation to the deprivation of liberty. Under the ICCPR, the requirement is that, 'No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.'⁹¹ Under the ACHR, 'No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.'⁹² Similarly, under the ACHPR, the requirement is that, 'No one may be deprived of his freedom except for reasons and conditions previously laid down by law.'⁹³ However, the ECHR is structured differently in this regard: first, 'No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law';⁹⁴ and, second, each of the specified grounds for detention requires that it be 'lawful'.⁹⁵ Notwithstanding the differences in structure and language, common between the instruments is the requirement that both the grounds and either conditions or procedures according to which individuals are deprived of their liberty must be based in law.

This requirement has often been interpreted as referring to domestic law. The ACHR is clearest and, arguably, most exacting in this respect,⁹⁶ on account of the express requirement in Article 7(2) that the reasons and conditions for deprivation of liberty be found in either the State's constitution, or in 'law established pursuant thereto'. With respect to the ICCPR, the HRC refers in the body of General Comment 35 to 'legal authorization',⁹⁷ but includes the following quote from its own practice in the associated footnote: 'the principle of legality is violated if an individual is arrested or detained on grounds which are

⁹¹ ICCPR (n 1) art 9(1).

⁹² ACHR (n 1) art 7(2).

⁹³ ACHPR (n 1) art 6.

⁹⁴ ECHR (n 1) art 5(1).

⁹⁵ ECHR (n 1) art 5(1)(a)–(f).

⁹⁶ Antkowiak and Gonza (n 57) 148.

⁹⁷ HRC General Comment 35 (n 56) para 22.

not clearly established in *domestic* legislation'.⁹⁸ General Comment 35 goes on to refer repeatedly to domestic law. For example, it states that, "Unlawful" detention includes both detention that violates domestic law and detention that is incompatible with the requirements of article 9, paragraph 1, or with any other relevant provision of the Covenant.⁹⁹ Similarly, with respect to Article 5 ECHR, the ECtHR has stated 'that the expressions "lawful" and "in accordance with a procedure prescribed by law" essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof.'¹⁰⁰

In the context of MSOs, the Australian Maritime Powers Act 2013 (MPA 2013) is an example of how deprivation of liberty may be authorised and regulated within domestic law. It contains a range of powers not only for authorised 'maritime officers' to arrest an individual whom is reasonably suspected of committing an offence under Australian law,¹⁰¹ or in respect of whom an arrest warrant has been issued,¹⁰² but also to exercise certain detention powers on behalf of other officials,¹⁰³ and, more generally, when 'exercising powers in relation to a vessel, installation, aircraft or land [to] place or keep a person in a particular place on the vessel, installation, aircraft or land.'¹⁰⁴ With respect to a detained vessel,¹⁰⁵ individuals on board may be held there, and may be detained and taken, or

⁹⁸ UN Human Rights Committee, 'Views of the Human Rights Committee under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights Concerning Communication No 702/1996' (Communication submitted by Clifford McLawrence, concerning Jamaica) (Views adopted 18 July 1997) UN Doc No CCPR/C/60/D/702/1996 para 5.5 (emphasis added). This is cited at HRC General Comment 35 (n 56) 7 fn 64. Although the reference to 'legislation' might seem unfortunate given its apparent exclusion of other forms of domestic law (such as the Common Law), it cannot plausibly be the case that the HRC intended to exclude other such forms of domestic law.

⁹⁹ HRC General Comment 35 (n 56) para 44.

¹⁰⁰ *Hilda Hafsteinsdóttir* (n 123) [51].

¹⁰¹ Maritime Powers Act 2013 s 76

¹⁰² *ibid* s 77

¹⁰³ *ibid* s 73.

¹⁰⁴ *ibid* s 71.

¹⁰⁵ The term 'detained vessel' is not defined; however, the powers that relate to such a vessel permit a maritime officer to take it, or cause it to be taken, to any destination, and to either remain in control of it himself or herself, or to require the person in charge of the vessel to remain in control. *ibid* s 69(2).

caused to be taken, to any destination,¹⁰⁶ and held for as long as is reasonably required to do so.¹⁰⁷

Each of these powers is subject to further obligations on the part of the State, including a general requirement that, 'A person arrested, detained or otherwise held under this Act must be treated with humanity and respect for human dignity, and must not be subject to cruel, inhuman or degrading treatment.'¹⁰⁸ With respect, specifically, to those who are arrested, the MPA 2013 sets out further detailed requirements, that the person be informed of the reason for their arrest;¹⁰⁹ and that, as soon as practicable, they be brought before a magistrate or delivered to the police or another competent authority.¹¹⁰ Notably, where an action must be done 'as soon as practicable', the MPA 2013 requires that certain matters be taken into account:

- (a) the location of the place where a person is arrested or detained;
- (b) the weather conditions at the time;
- (c) the means of transport available;
- (d) the need to proceed or continue with the exercise of powers under [the MPA 2013];
- (e) the need to ensure the safety of a vessel, installation or aircraft;
- (f) the need to take action to:
 - (i) protect human life, animal life or the environment; or
 - (ii) aid a vessel in distress; or
 - (iii) obtain medical assistance for any person.¹¹¹

Both the powers contained in the MPA 2013, and the procedural obligations, reflect the particular requirements of MSOs. As set out above, in the course of

¹⁰⁶ *ibid* s 72.

¹⁰⁷ *ibid* s 72A.

¹⁰⁸ *ibid* s 95

¹⁰⁹ *ibid* s 100

¹¹⁰ *ibid* s 101.

¹¹¹ *ibid* s 96.

MSOs, individuals may be argued to have been deprived of their liberty in a broader range of circumstances than narrowly defined circumstances of, for example, arrest or police custody. It is therefore notable that the MPA 2013 provide positive powers that deal explicitly with this issue; indeed, it expressly states that, ‘Any restraint on the liberty of a person that results from the operation of [the relevant part of the MPA 2013] does not constitute arrest, and is not unlawful.’¹¹² Also clearly tailored to the particular requirements of MSOs are the factors to be taken into account in determining the time in which things may practicably be done.

The MPA 2013 is unusual in providing such clear bases and procedures for the deprivation of liberty in the course of MSOs in a State’s domestic law, particularly in a consolidated form. To illustrate, the UK, for example, has no equivalent to the MPA 2013, although certain powers are contained in legislation dealing with specific issues. For example, the Criminal Justice (International Co-operation) Act 1990, which implements the Vienna Convention,¹¹³ contains enforcement powers in respect of UK-flagged ships suspected of involvement in drug trafficking, as well as stateless vessels and vessels flagged to a State party to the Convention, for which permission from that State has been granted.¹¹⁴ It provides for a right of arrest in respect of individuals reasonably suspected of being guilty of a relevant offence,¹¹⁵ but does not contain further details as to procedure, or broader powers to deprive individuals of their liberty, other than when they are placed under arrest. Furthermore, other circumstances where individuals may be deprived of their liberty, such as in the case of those suspected of piracy, are not dealt with at all in the UK’s domestic legislation.

Such lacunae prompt the question whether other sources of law may suffice to meet the requirement of lawfulness. In the context of MSOs, which by their nature, often involve action taken by agents of one State against nationals of another, it is especially important to consider the potential role of international

¹¹² *ibid* s 75.

¹¹³ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (n 17).

¹¹⁴ Criminal Justice (International Co-operation) Act 1990 (CJICA 1990) ss 18–20.

¹¹⁵ *ibid* sch 3 para 4(a).

law.¹¹⁶ This is an area where there is likely to be divergence between the different IHRL treaty regimes. For the ACHR, the express terms of Article 7(2) are such that only law that forms part of a State's constitution, or is enacted pursuant to it, will suffice. However, the language of the other instruments, which refer only to 'law' and lawfulness, is arguably less restrictive. Although, as noted above, the HRC and ECtHR have generally referred to domestic law, this might be argued to reflect the fact that, in the common situation where a State acts within its own borders, international law will simply not be relevant as a potential basis for the deprivation of liberty.

Notably, where international law *has* been of potential relevance, the practice of the ECtHR, and of other courts applying the ECHR, suggests that it may be capable of meeting the lawfulness requirements.¹¹⁷ In *Medvedyev and others v France*, the Court stated 'that where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law but also, where appropriate, to other applicable legal standards, *including those which have their source in international law*.'¹¹⁸ Consistent with this, in *Hassan v United Kingdom* the Grand Chamber held that Article 5 ECHR should be read to include, alongside Article 5's enumerated grounds, detention in the course of an international armed conflict.¹¹⁹ On the specific question of lawfulness, the Grand Chamber stated that

As with the grounds of permitted detention already set out in those subparagraphs, deprivation of liberty pursuant to powers under international humanitarian law must be "lawful" to preclude a violation of Article 5 § 1. This means that the detention must comply with the rules of international humanitarian law and, most importantly, that it should be in keeping with the fundamental purpose of Article 5 § 1, which is to protect the individual from arbitrariness.¹²⁰

¹¹⁶ Noting the different types of relationship that it may have with domestic law according to a State's particular constitutional arrangements. See, for example, Malcolm N Shaw, *International Law* (7th edn, CUP 2014) 92–141.

¹¹⁷ Petrig (n 12) 213.

¹¹⁸ *Medvedyev* (n 14) [73] (emphasis added). See also Tullio Treves, 'Human Rights and the Law of the Sea' (2010) 28 Berkeley J of Intl L 1, 8–10.

¹¹⁹ *Hassan v the United Kingdom* ECHR 2014.

¹²⁰ *Ibid* [105] (citations omitted).

The reliance on international humanitarian law in *Hassan*, and absence of any reference to a requirement for it to be implemented in domestic law, provides strong support for the argument that, at least for the purposes of the ECHR, a legal basis may be found in unincorporated international law.

As set out above, the law of the sea contains numerous provisions that might be argued to authorise, implicitly or explicitly, the deprivation of liberty. For example, Article 110 UNCLOS provides that warships and other authorized vessels are entitled to board foreign-flagged vessels on the high seas when reasonable grounds exist for suspecting that the vessel is engaged in piracy; the slave trade; unauthorized broadcasting (in certain circumstances); is without nationality; or is feigning its foreign-flagged status.¹²¹ In such cases, the interdicting ship

may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.¹²²

The power described provides clear authority in international law for a vessel to be stopped, boarded and searched in clearly defined circumstances. Furthermore, the process to be followed is set out in brief but certain terms. Therefore, to the extent that the crew members of the interdicted vessel are necessarily deprived of their liberty in the course of their vessel being boarded and searched in accordance with Article 110, UNCLOS might plausibly provide a legal basis for the interdicting State's actions, although not the detail required as to the procedures to be followed.

However, whatever the source of the law, either domestic or international, it must adhere to the principle of legal certainty, which has been referred to by both the ECtHR and IACtHR.¹²³ As the Grand Chamber in *Medvedyev* stated:

¹²¹ UNCLOS (n 16) art 110(1).

¹²² *ibid* art 110(2).

¹²³ *Medvedyev* (n 14) [80]. With respect to the IACtHR, see Antkowiak and Gonza (n 57) 150, though noting the point that 'it is currently uncommon for the Court to find violations when domestic law fails to comply with the principle of legal certainty.'

It is...essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of “lawfulness” set by the Convention, a standard which requires that all law be sufficiently precise to avoid all risk of arbitrariness and to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances of the case, the consequences which a given action may entail.¹²⁴

The application in *Medvedyev* of this principle, and of the law concerning the lawfulness requirement, generally, under Article 5(1) ECHR, is illustrative of the complexity that may be encountered and the particular issues that can arise in the context of MSOs. The situation in *Medvedyev* was complicated by the fact that Cambodia, the flag State of the *Winner*, was party to neither UNCLOS nor the Vienna Convention. Therefore, Article 108 UNCLOS and Article 17 Vienna Convention, both of which make provision for cooperation in the suppression of narcotics trafficking between States parties, were held to be inapplicable.¹²⁵ As a consequence, also inapplicable were provisions of French domestic law that provided enforcement powers with respect to vessels reasonably suspected of illicit narcotics trafficking, but only where the vessel in question is French-flagged, stateless, or flagged to a State party of the Vienna Convention, notwithstanding that the French courts had found the provisions to be applicable.¹²⁶ Even if the domestic law provisions somehow *had* been applicable, a majority of the Grand Chamber considered that their application would have violated the principle of legal certainty, as it was ‘unreasonable to contend that the crew of a ship on the high seas flying the Cambodian flag could have foreseen—even with appropriate advice—that they might fall under French jurisdiction in the circumstances of the case.’¹²⁷

¹²⁴ *Medvedyev* (n 14) [80] (citations omitted).

¹²⁵ *ibid* [84]–[85]. The Grand Chamber rejected an argument put forward by the French government that its actions were permitted by Article 110 UNCLOS on the basis that the *Winner* was not showing its flag; however, the Grand Chamber correctly pointed out that France clearly knew the *Winner* was Cambodian-flagged and clearly, therefore, was neither withholding a French flag, nor reasonably suspected of being without nationality. *ibid* [86]–[89]. It also considered, and rejected, the possibility that the relevant provisions of UNCLOS and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances represented customary law, and would thus be binding on Cambodia. *ibid* [92].

¹²⁶ *ibid* [90]–[91].

¹²⁷ *ibid* [92].

In light of these findings, the Grand Chamber turned to consider whether a diplomatic note, in which Cambodia authorised the actions of the French government, could satisfy the requirement of lawfulness. The Court agreed that States are free to enter into ad hoc agreements to combat narcotics trafficking at sea;¹²⁸ that diplomatic notes are sources of international law;¹²⁹ and that the note in question formalised Cambodia's agreement to the interception of the *Winner*.¹³⁰ However, the majority did not consider that the note in question, which authorised 'the French authorities to intercept, inspect and take legal action against the ship Winner, flying the Cambodian flag',¹³¹ dealt sufficiently clearly with the action to be taken against the crew members, such that 'their deprivation of liberty was the subject of an agreement between the two States that could be considered to represent a "clearly defined law" within the meaning of the Court's case-law.'¹³² The note also failed to meet the requirement of foreseeability; the absence 'of any current and long-standing practice between Cambodia and France in the battle against drug trafficking at sea in respect of ships flying the Cambodian flag' meant that detention by France on the basis of an ad hoc agreement was not foreseeable to the crew.¹³³

Consequently, by a majority of ten to seven, the Court found there to have been a violation of Article 5(1). The dissenting judges considered that 'it is necessary to be realistic in such exceptional circumstances.' Notwithstanding the issues identified by the majority, they concluded that the deprivation was 'was not arbitrary, which is, of course, what Article 5 requires above all', and that, in the circumstances, it was not 'necessary to apply the same criteria of "lawfulness" to the legal basis provided by the diplomatic note as are applied in much less exceptional situations.' In summary, they found that

When there is sufficient concurring evidence to suspect that a ship on the high seas, thousands of miles from the State thus authorised to board it, is engaged in international trafficking to which all countries want to put a stop, it is without a doubt legitimate not to place as narrow an

¹²⁸ *ibid* [95].

¹²⁹ *ibid* [96].

¹³⁰ *ibid* [97].

¹³¹ *ibid* [10] (quoting the diplomatic note).

¹³² *ibid* [99].

¹³³ *ibid* [100].

interpretation on the legal basis as one would inside the territory of the State concerned.¹³⁴

However, according to the majority in *Medvedyev*, even though international law is capable of providing the legal basis for the deprivation of liberty, at least for the purposes of the ECHR, it must not only be sufficiently clear in its authorisation, but also foreseeable in its application. According to this position, even if an ad hoc agreement sets out in detail the power of another State to detain the authorising State's nationals, it will still fail to meet the required standard of foreseeability if it is not supported by either established practice or some form of pre-existing framework agreement. Although *Medvedyev* represents only a single decision, decided by majority, it may amount to a significant restraint on the ability of States to deprive individuals of their liberty outside of frameworks established either by agreement or practice. While the minority view highlights, perhaps understandable, discomfort at the consequences of applying a rigid approach to such complicated situations, the majority position was arguably inevitable given the requirement of foreseeability, with which ad hoc arrangements will be inherently difficult to reconcile.

5.4.5. Arbitrariness and grounds for deprivation of liberty

As set out above, the relevant provisions of the ICCPR, ACHR and ACHPR each expressly prohibit arbitrary deprivation of liberty. On the face of it, the ECHR takes a different approach setting out particular circumstances in which deprivation of liberty may be permitted, without express reference to arbitrariness. These grounds are discussed further below. However, the practice of the ECtHR has demonstrated that a prohibition of arbitrary deprivation of liberty nevertheless underpins Article 5 ECHR.¹³⁵

Although there is significant overlap between the concept of unlawful detention and arbitrary detention,¹³⁶ it is not sufficient for deprivation of liberty merely to be lawful. The view expressed by the HRC in General Comment 35 summarises the position:

¹³⁴ Ibid, Joint Partly Dissenting Opinion of Judges Costa, Casadevall, Bîrsan, Garlicki, Hajiyev, Šikuta And Nicolaou [10].

¹³⁵ See the practice and discussion at Schabas (n 57) 232.

¹³⁶ See, for example, HRC General Comment 35 (n 56) para 11.

An arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.¹³⁷

Similarly, the IACtHR has stated that Article 7 prohibits the deprivation of liberty ‘for reasons and by methods which, although classified as legal, could be deemed incompatible with respect for the fundamental rights of the individual because, among other matters, they are unreasonable, unforeseeable or disproportionate.’¹³⁸ The African Commission has also found that detention that is lawful within a State’s domestic legal order may nevertheless violate Article 6 ACHR, which ‘must be interpreted in such a way as to permit arrests only in the exercise of powers normally granted to the security forces in a democratic society.’¹³⁹ For example, in *Amnesty International and others v Sudan*, the African Commission held that detentions pursuant to a decree were in violation of Article 6 in part because ‘the wording of this decree allows for individuals to be arrested for vague reasons, and upon suspicion, not proven acts, which conditions are not in conformity with the spirit of the African Charter.’¹⁴⁰

With respect to ECtHR’s practice, deprivation of liberty may be considered arbitrary, notwithstanding that it may comply technically with an authorising law, and whether or not it is justified under one of the grounds set out in Article 5(1). The ECtHR has summarised the position as follows:

Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of “arbitrariness” in Article 5 §1 extends beyond lack of conformity with national law, so that a deprivation

¹³⁷ *ibid* para 12.

¹³⁸ *Yvon Neptune v Haiti* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 180 (6 May 2008) [97]. See also Antkowiak and Gonza (n 57) 156.

¹³⁹ *Amnesty International and Others v Sudan* [2000] African Human Rights Law Reports 297 (ACtHPR 1999) [59]. See also Bronwen Manby, ‘Civil and Political Rights in the African Charter on Human and Peoples’ Rights: Articles 1–7’ in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples’ Rights* (2nd edn, CUP 2008) 197.

¹⁴⁰ *Amnesty International* (n 139) [59].

of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention.¹⁴¹

Although there is no 'global definition' as to what arbitrariness means in the context of the ECHR,¹⁴² 'an element of bad faith or deception on the part of the authorities' will render an otherwise lawful deprivation of liberty arbitrary.¹⁴³ In addition, 'both the order to detain and the execution of the detention must genuinely conform with the purpose of the restrictions permitted by the relevant [grounds]'.¹⁴⁴

From this brief survey, it is clear that arbitrariness is a broad concept, which, as a result, is difficult to apply in the abstract. Whether or not a particular deprivation of liberty is, for example, unnecessary or disproportionate, will depend on the particular circumstances. This is as true in MSOs as in any other context. More helpful is to consider the specific grounds in Article 5(1) ECHR on which deprivation of liberty may be permitted. These are strictly applicable only to the ECHR, but also provide a guide as to what may be considered arbitrary or not under the other instruments.

Considering the list of grounds itself, although the practice of the ECtHR has been to treat it as exhaustive,¹⁴⁵ recent developments reveal a slightly more flexible approach. In *Hassan v United Kingdom*, the Grand Chamber noted that, 'It has long been established that the list of grounds...does not include internment or preventive detention where there is no intention to bring charges within a reasonable time'.¹⁴⁶ However, in light of both subsequent State practice and other relevant rules of international law,¹⁴⁷ namely international humanitarian law, a majority in the Grand Chamber concluded that Article 5 could be interpreted as permitting security detention during an international

¹⁴¹ *Saadi v the United Kingdom* ECHR 2008-I 31 [67].

¹⁴² *ibid* [68].

¹⁴³ *ibid* [69].

¹⁴⁴ *ibid* [69].

¹⁴⁵ See, for example, *Labita v Italy* ECHR 2000-IV 99 [170]. See also Schabas (n 57) 234.

¹⁴⁶ *Hassan* (n 119) [97] (citations omitted).

¹⁴⁷ Vienna Convention on the Law of Treaties (concluded 23 May 1969, entered into force 27 January 1980) 1155 UNTS 332 (1969 Vienna Convention) art 31(3)(b)–(c).

armed conflict.¹⁴⁸ The result of this decision was effectively to extend the list of permissible grounds under Article 5(1), opening the door to the potential future addition of further grounds. However, while *Hassan* represents an important departure, its impact on cases unrelated to the vexed issue of the interaction between international humanitarian law and international human rights law should not be overstated. Instead, it should be treated as a genuinely exceptional case and, in general, it remains the case that any deprivation of liberty must fall within one of the listed grounds.¹⁴⁹

In the context of MSOs, three of the listed grounds are likely to be relevant. First, though addressing them out of order, under Article 5(1)(c), an individual may be deprived of his liberty in the case of ‘the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so’. Deprivation of liberty may therefore be permitted under Article 5(1)(c) in three distinct circumstances: where there is reasonable suspicion that an individual has committed an offence; where reasonably necessary to prevent commission of an offence; and where reasonably necessary to prevent an individual fleeing having committed an offence. However, for all three, deprivation of liberty is only permissible for the purpose of bringing an individual before a competent legal authority,¹⁵⁰ whether or not

¹⁴⁸ Specifically, ‘the taking of prisoners of war and the detention of civilians who pose a threat to security’. *Hassan* (n 119) [100]–[104]. See, however, the partly dissenting opinion of Judge Spano, joined by Judges Nicolaou, Bianku and Kalaydjieva, concluding that:

the powers of internment under the Third and Fourth Geneva Conventions, relied on by the Government as a permitted ground for the capture and detention of Tarek Hassan, are in direct conflict with Article 5 § 1 of the Convention. The Court does not have any legitimate tools at its disposal, as a court of law, to remedy this clash of norms. It must therefore give priority to the Convention.... By attempting to reconcile the irreconcilable, the majority’s finding today does not, with respect, reflect an accurate understanding of the scope and substance of the fundamental right to liberty under the Convention....

Hassan (n 119) Partly Dissenting Opinion of Judge Spano Joined by Judges Nicolaou, Bianku and Kalaydjieva [19].

¹⁴⁹ Schabas (n 57) 235.

¹⁵⁰ *Lawless v Ireland (no 3)* Series A no 3 (ECtHR) [14].

that outcome is ultimately achieved.¹⁵¹ As a result, the Court has stated that, 'A person may be detained within the meaning of Article 5 § 1 (c) only in the context of criminal proceedings, for the purpose of bringing him before the competent legal authority on suspicion of his having committed an offence.'¹⁵² Consequently, purely preventive detention is not permitted.¹⁵³ In addition, the 'offence' on which the availability of Article 5(1)(c) rests must be 'specific and concrete'.¹⁵⁴

In the context of MSOs, Article 5(1)(c) will frequently provide the grounds for depriving an individual of his liberty, albeit only where the purpose genuinely is to bring the individual before a competent legal authority, in relation to a particular offence. This will primarily be the case where individuals are detained based on a crime set out in domestic criminal law, with respect to which there is an interaction with the requirement of legality, discussed above. Piracy is an obvious example of an offence in relation to which individuals will frequently be detained at sea. However, while the law of the sea provides a definition of piracy arguably sufficient to meet the 'specific and concrete' standard in terms of its specificity,¹⁵⁵ detention of individuals suspected of piracy will only be permitted where there is a genuine intent and possibility to pursue criminal proceedings. To this extent, it will be necessary to examine whether there exists an appropriate offence within the jurisdiction of the State responsible for detention, or within the jurisdiction of a State to which the detainee might be transferred. The mere fact that the act of piracy is defined under international law does not, in itself, create a criminal offence and does not mean, therefore, that the detention of anyone suspected of an act meeting that definition can be grounded in Article 5(1)(c).

Turning, second, to Article 5(1)(b), under the second limb of the article, an individual may be deprived of his liberty 'in order to secure the fulfilment of any obligation prescribed by law'. This ground is relevant where it is truly necessary to deprive an individual of his liberty in order to secure the fulfilment of a

¹⁵¹ Petrig (n 12) 173–4 (citing *Labita v Italy* (n 145) [155]).

¹⁵² *Jėčius v Lithuania* ECHR 2000-IX 235.

¹⁵³ Petrig (n 12) 170.

¹⁵⁴ *Ciulla v Italy* (1989) Series A no 148 (ECtHR) [40].

¹⁵⁵ UNCLOS (n 16) art 101.

‘specific and concrete obligation which he has until then failed to satisfy’,¹⁵⁶ in contrast to a mere ‘general duty of obedience to the law.’¹⁵⁷ It is particularly relevant where it is necessary to deprive an individual of his liberty in a law-enforcement context, absent the ‘reasonable suspicion of having committed an offence’ required under Article 5(1)(c), and has been applied in various such circumstances.¹⁵⁸

For example, in *Iliya Stefanov v Bulgaria*, the applicant, a lawyer, was detained by the police for several hours while he was interviewed as a witness in connection to a serious allegation against one of his clients.¹⁵⁹ At the time of the interview, there was not ‘a sufficiently firm suspicion against him to the extent that this interview was in reality a preparatory stage to charging him’, and thus deprivation of liberty under Article 5(1)(c) was not permissible. However, although he had attended voluntarily, Bulgarian law placed ‘witnesses not only under the obligation to appear for questioning, but also to remain at the disposal of the authorities until necessary for this purpose’.¹⁶⁰ The Court therefore considered whether the deprivation of liberty could be justified under Article 5(1)(b) on account of the specific obligation placed on him by Bulgarian law. The Court stated that deprivation on this ground must meet certain criteria:

It has to be specific and concrete, and the arrest and detention must be truly necessary for the purpose of ensuring its fulfilment. Moreover, in assessing whether the deprivation of liberty is justified, a fair balance has to be drawn between the significance in a democratic society of securing the fulfilment of the obligation in issue and the importance of the right to liberty. The relevant factors in drawing this balance are the nature and the purpose of the obligation, the detained person, the specific circumstances which led to his or her detention, and the length of the detention.¹⁶¹

In the circumstances of the case, the Court considered that the deprivation of the applicant’s liberty ‘for a limited amount of time for the purpose of taking his

¹⁵⁶ *Engel and Others v the Netherlands* Series A no 22 (ECtHR) [69].

¹⁵⁷ *ibid.*

¹⁵⁸ See the practice surveyed at Schabas (n 57) 236–37.

¹⁵⁹ *Iliya Stefanov v Bulgaria* App No 65755/01 (ECtHR, 22 May 2008) [5]–[20]. The Court did not resolve the question whether, in the circumstances, the applicant had, in fact, been deprived of his liberty, but proceeded to analyse the case on the basis that he had. *ibid* [71].

¹⁶⁰ *ibid* [73].

¹⁶¹ *ibid* [72] (citations omitted).

statement' was not contrary to Article 5(1)(b).¹⁶² Specifically, it did 'not consider that by keeping the applicant in custody for a period totalling five hours the authorities overstepped the reasonable balance between the need to question him and his right to liberty.'¹⁶³

Analogous situations may arise in MSOs. While detention will frequently occur in circumstances where there is reasonable suspicion of the detained individual having committed an offence (e.g. piracy), considered in connection with Article 51(1)(c) above, it may be necessary to deprive individuals of their liberty in circumstances where that is not necessarily the case. This may happen, for example, where a vessel is subject to the right of visit under Article 110 UNCLOS, which authorises inspections in a range of situations much broader than just where an individual is reasonably suspected of committing an offence. In the course of such inspections, the crew members may nevertheless be deprived of their liberty. Where this is the case, the grounds may be compatible with Article 51(1)(b), so long as they amount to a specific and concrete legal obligation, and the deprivation of liberty also meets the other criteria identified by the ECtHR, as set out above.

It should be emphasised, however, that Article 51(1)(b) requires there to be a legal obligation on the part of the individual deprived of his or her liberty, and not merely a legal right on the part of the State to undertake the activity concerned. Otherwise, apart from distorting the actual language used, it would go no further than the requirement of legality. For example, in the context of MSOs, Article 110 UNCLOS, creates a right on the part of the State conducting an inspection of an interdicted vessel, but does not, in itself, create a corresponding obligation on the part of the individual crew members. Such an obligation will more plausibly derive from the domestic law of the State responsible for the deprivation of liberty. For example, under the Australian MPA 2013, an individual may be required to cooperate with a boarding in a number of ways, such as to take reasonable steps to facilitate the boarding of a vessel,¹⁶⁴ or to answer questions or produce documents.¹⁶⁵ Requirements of this kind, set out in the domestic law of the interdicting State, are likely to

¹⁶² *ibid* [75].

¹⁶³ *ibid*.

¹⁶⁴ Maritime Powers Act 2013 s 53(1).

¹⁶⁵ Maritime Powers Act 2013 s 57(1).

amount to specific and concrete legal obligations such as might justify deprivation of liberty under Article 51(1)(b). Although Australia is not, of course, subject to the ECHR, the grounds under Article 5(1) may, as suggested above, be illustrative of the situations in which deprivation of liberty might be considered non-arbitrary under the other instruments, including the ICCPR.

Finally, under Article 5(1)(f) it may be permissible to deprive an individual of his liberty in the case of ‘the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.’ As Schabas notes, all that this ground ‘requires is that detention be directed at preventing unauthorized entry or at removal from the country.’¹⁶⁶ It does not require that an individual has committed an offence, nor even that detention is necessary for any reason beyond preventing entry or effecting removal. Nevertheless:

such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate...; and the length of the detention should not exceed that reasonably required for the purpose pursued.¹⁶⁷

Article 5(1)(f) will be relevant in a maritime security context, but only in narrowly delimited circumstances. Where individuals attempt to gain unauthorized entry to a coastal State (including its territorial sea and internal waters) by sea, then, to the extent that they are deprived of their liberty in the course of being removed, it will provide grounds under Article 5 for the coastal State’s actions. However, it cannot be relied upon as grounds for a coastal State to detain unauthorized immigrants at sea for any longer than required to effect their removal, or for any other purpose. It could not, for example, be relied upon with respect to the detention of an unauthorized immigrant in connection with a suspected crime.¹⁶⁸

It is important to recognise that deprivation of liberty may be justified under more than one of the Article 5(1) grounds, and the relevant grounds may change during the course of an individual’s detention. For example, where an

¹⁶⁶ Schabas (n 57) 243.

¹⁶⁷ *Saadi* (n 141) [74]. See also Schabas (n 57) 243.

¹⁶⁸ Detention in such circumstances may, of course, fall within one of the other lawful reasons.

individual is deprived of his liberty in order for a State to exercise its power under Article 110(1)(d) UNCLOS to visit a ship reasonably suspected of being without nationality, the relevant ground is likely to be the second limb of Article 5(1)(b), i.e. in order to fulfil a legal obligation. Where the result of the visit is reasonable suspicion that the individual has committed an offence, continued deprivation of liberty will be justified under Article 5(1)(c). Similarly, where a coastal State intercepts a vessel heading towards its coast in order to check the immigration status of its occupants, any deprivation of liberty will again be justified on grounds under Article 5(1)(b). If the coastal State then continues to deprive individuals of their liberty in order to remove them from its territory, that will be justified on grounds under Article 5(1)(f).

5.4.6. Procedural rights and obligations

The ICCPR, ECHR and ACHR each contain similar, express, procedural requirements relating to the deprivation of liberty.¹⁶⁹ However, as noted by Evans and Murray, the ACHPR is 'comparatively vestigial in its details when read alongside the ICCPR or other regional treaties'.¹⁷⁰ Indeed, it contains no express procedural requirements whatsoever. Nevertheless, the African Commission has adopted *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa*, which are intended to assist States in their implementation of Article 6 ACHPR, as well as other relevant rights,¹⁷¹ in the context of arrest, police custody and pre-trial detention. Although amounting only to soft law, the *Guidelines* are nevertheless likely to be illustrative of the approach that will be taken by the African Commission. In the analysis below, footnotes indicate where an obligation contained in the text of the other instruments is also reflected in the *Guidelines*.

Identifying, in broad terms, the procedural rights and obligations relating to deprivation of liberty, Article 9(2) ICCPR, Article 5(2) ECHR and Article 7(4) ACHR contain the obligation for States to inform individuals of the reason for

¹⁶⁹ ICCPR (n 1) art 9(2)–(5); ECHR (n 1) art 5(2)–(5).

¹⁷⁰ Manby (n 139) 197.

¹⁷¹ Specifically ACHPR (n 1) arts 2, 3, 5, 6, 7, 26. African Commission on Human and Peoples' Rights, 'Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa' (adopted during the 55th Ordinary Session in Luanda, Angola, 28 April–12 May 2014) (Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa) 5.

their arrest ('detention' in the case of the ACHR) and of any charges against them.¹⁷² Article 9(3) ICCPR, Article 5(3) ECHR and Article 7(5) ACHR require States to bring detained individuals promptly before a judicial authority; for any trial to be held within a reasonable time; and for detainees to be released, potentially subject to guarantees, if a trial is not held within a reasonable time.¹⁷³ Article 9(4) ICCPR, Article 5(4) ECHR and Article 7(6) ACHR require that individuals deprived of their liberty have the right promptly to challenge the lawfulness of their detention before a court empowered to order their release (essentially a right to *Habeas Corpus*).¹⁷⁴ Finally, Article 9(5) ICCPR and Article 5(5) ECHR (but not Article 7 ACHR) require that individuals have an enforceable right to compensation in the case of violations of Article 9 ICCPR and Article 5 ECHR respectively.¹⁷⁵

¹⁷² Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (n 171) 9 ('The following rights shall be afforded to all persons under arrest: ... The right to be informed of the reasons for their arrest and any charges against them.')

¹⁷³ *ibid* 9–10 ('The following rights shall be afforded to all persons under arrest: ... The right to apply for release on bail or bond pending investigation or questioning by an investigating authority and/or appearance in court.');

ibid 14 ('All persons shall have the right to a fair trial, within a reasonable time, in accordance with international law and standards').

¹⁷⁴ *ibid* 9–10 ('The following rights shall be afforded to all persons under arrest: ... The right to challenge promptly the lawfulness of their arrest before a competent judicial authority.')

In addition, under art 7(6) ACHR, where a State party allows an individual, or someone acting on their behalf, to seek redress where there is a perceived threat of being deprived of his or her liberty, that right is not to be restricted or abolished. ACHR (n 1) art 7(6).

¹⁷⁵ Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (n 171) 29 ('All persons who are victims of illegal or arbitrary arrest and detention, or torture and ill-treatment during police custody or pre-trial detention have the right to seek and obtain effective remedies for the violation of their rights. This right extends to immediate family or dependents of the direct victim. Remedies include, but are not limited to: ... Compensation, including any quantifiable damages resulting from the right violation and any physical or mental harm (such as physical or mental harm, pain, suffering and emotional distress, lost opportunities including education, material damage and loss of actual or potential earnings, harm to reputation or dignity, and costs required for legal services or expert assistance, medicines, medical services, and psychological and social services).')

5.4.6.1. *The obligation to inform individuals of the reason for their arrest and of any charges against them (Article 9(2) ICCPR, Article 5(2) ECHR and Article 7(4) ACHR)*

The requirements to inform individuals of the reason for arrest and to inform them of any charges against them are separate and distinct.¹⁷⁶ Considering, first, the latter of these, the obligation to inform an individual of the charge against him or her will arise only in circumstances where criminal charges are brought.¹⁷⁷ It follows that there will be little that is remarkable about its application to MSOs; where an individual who has been deprived of their liberty is subject to criminal charges, he or she must be told what they are, although not necessarily in the detail that would be required in advance of trial.¹⁷⁸ Language differences between detainees and the detaining crew might be more likely to present an issue at sea than on land; however, so long as communication with shore authorities is possible, resources ought to be available to provide a translation of the essential facts within the required timescale.

With respect to the requirement to give reasons for arrest, the use of the words ‘arrest’ and ‘criminal’ in Article 5(2) ECHR (and, similarly, in Article 9(2) ICCPR) could be read as implying that requirement to inform individuals of the reason for their arrest is relevant only in the context of criminal proceedings. However, this is not the case and the obligation to give reasons applies to any deprivation of liberty. The HRC, consistent with the practice of the ECtHR, has stated that ‘Because “arrest” means the commencement of a deprivation of liberty, [the requirement to give reasons] applies regardless of the formality or informality with which the arrest is conducted and regardless of the legitimate or improper reason on which it is based.’¹⁷⁹ Indeed, it would make little sense for only a subset of situations amounting to a deprivation of liberty to be subject to the requirement to give reasons. As explained above, it is fundamental to the right to liberty that its deprivation be only for lawful, non-arbitrary reasons; if such

¹⁷⁶ See, for example, Laurence Burgorgue-Larsen and Amaya Úbeda de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (OUP 2011) para 19.16. The point is made specifically in relation to the ACHR but is applicable more widely.

¹⁷⁷ HRC General Comment 35 (n 56) para 24; Schabas (n 57) 245.

¹⁷⁸ HRC General Comment 35 (n 56) para 30.

¹⁷⁹ HRC General Comment 35 (n 56) para 24; Schabas (n 57) 245.

reasons must exist in the case of *any* deprivation of liberty in order for it not to violate the right to liberty, there is no apparent justification for withholding them in some situations but not others.

Turning to the ACHR, the situation is less clear. Article 7(4) ACHR refers to ‘detention’ rather than ‘arrest’, although the IACtHR has frequently used the latter terminology, and has construed it broadly, stating that ‘the obligation to inform the person of the motives and reasons for his arrest and of his rights does not accept exceptions and must be observed independently of the way in which the arrest occurs.’¹⁸⁰ However, in the context of the particular judgment, this concerned the distinction between ‘arrest made through a court order and that practiced *infraganti*’,¹⁸¹ and arguably still referred only to arrest in the course of criminal proceedings.

More generally, *all* of the procedural obligations under Article 7(5)–(6) ACHR have been interpreted in the literature as being ‘specific to criminal matters’, in contrast to the generality of the earlier paragraphs.¹⁸² Although Antkowiak and Gonza note that they ‘now [also] extend to administrative deprivations of liberty, such as the detention of migrants or the mentally ill’,¹⁸³ this still does not encompass the full range of situations in which individuals are deprived of their liberty. Hence, in *Torres Milacura et al v Argentina*, which concerned, in part, the lawfulness of a short-term deprivation of liberty while an individual was transported to a police station,¹⁸⁴ the Court did not consider the procedural requirements under the ACHR, notwithstanding that they clearly had not been met. Instead, it found there to have been a violation of Article 7(2), on the basis that a failure to meet procedural requirements under *domestic* law rendered the deprivation of liberty unlawful.¹⁸⁵ Therefore, although the argument in principle for imposing such an obligation applies equally to the ACHR as it does to the ICCPR and ECHR, the obligation to give reasons under the ACHR arguably may not currently extend to all deprivations of liberty.

¹⁸⁰ *López Álvarez v Honduras* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 141 (1 February 2006) [84].

¹⁸¹ *ibid* [83].

¹⁸² Burgogue-Larsen and de Torres (n 176) para 19.15.

¹⁸³ Antkowiak and Gonza (n 57) 142.

¹⁸⁴ *Torres Millacura* (n 77) [63].

¹⁸⁵ *ibid* [74]–[76].

With respect to timing, the instruments contain differing requirements. Article 9(2) ICCPR requires that the reasons for arrest must be given ‘at the time of arrest’, which the HRC has stated amounts to a material distinction from the requirement of promptness that applies to notification of charges. Whereas the nature of the charges may be explained ‘some hours later’,¹⁸⁶ the requirement to give reasons for arrest must be met immediately, except in the case of exceptional circumstances, such as the unavailability of an interpreter, which may be particularly relevant to MSOs.¹⁸⁷ However, under Article 5(2) ECHR, the standard of promptness applies both to reasons and to any charges. While the meaning of ‘prompt’ will depend on the ‘special features’ of each case,¹⁸⁸ both requirements will be met if the information is provided within ‘a few hours’.¹⁸⁹ Article 7(4) ACHR takes another approach again, referring to promptness in relation to notification of charges, but remaining silent with respect to giving reasons for arrest. However, in interpreting the requirement under Article 7(4), the IACtHR has cited the equivalent provision of the United Nations’ *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*,¹⁹⁰ which requires that, ‘Anyone who is arrested shall be informed *at the time of his arrest* of the reason for his arrest and shall be promptly informed of any charges against him.’¹⁹¹ From this, it seems that the requirement under the ACHR reflects that which applies under the ICCPR.

Applying this to deprivation of liberty in the course of MSOs, it was argued above that the right to liberty may be engaged in a broad range of circumstances, including situations where an interdicted vessel, as a whole, is subject to control by the interdicting ship, potentially even before a boarding

¹⁸⁶ HRC General Comment 35 (n 56) para 30.

¹⁸⁷ Any ‘delay may be required before an interpreter can be present, but any such delay must be kept to the absolute minimum necessary.’ *ibid* para 27 (citation omitted).

¹⁸⁸ *Čonka v Belgium* ECHR 2002-I [50]. See also Schabas (n 57) 246.

¹⁸⁹ *Fox, Campbell and Hartley v the United Kingdom* Series A no 182 (ECtHR) [42]. See also Schabas (n 57) 246.

¹⁹⁰ UNGA, ‘Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment’ (9 December 1988) UN Doc A/RES/43/173 (UN Principles for the Protection of All Persons under Any Form of Detention or Imprisonment).

¹⁹¹ *Tibi v Ecuador* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 114 (7 September 2004) [110] (citing UN Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (n 190) para 10) (emphasis added).

takes place. If this is correct, it follows that the requirement to give reasons for the deprivation of liberty will apply. In practice, given the requirement under the ICCPR and ACHR that this be done at the time of arrest, this will mean that the action taken by an interdicting ship to bring an interdicted vessel under its control ought to be accompanied by notification of the reason for the interdiction. It will therefore be insufficient to inform a vessel simply that it is to be boarded; rather the direction should include the legal basis and grounds pursuant to which the order is being made. Although not necessarily an onerous obligation, it obviously requires that the legal basis and grounds be properly identified in advance and may, as a result, expose any issues or defects with them. Furthermore, although even the stricter requirements of the ICCPR can be relaxed where an interpreter is not available, language differences between the detainees and detaining crew may nevertheless present a practical challenge, noting that any delay must be no more than ‘the absolute minimum necessary.’¹⁹²

5.4.6.2. The obligation to bring detainees before a judicial authority (Article 9(3) ICCPR, Article 5(3) ECHR and Article 7(5) ACHR)

The applicability of Article 9(3) ICCPR and Article 5(3) ECHR is contingent, in both instruments, on the existence of criminal charges. This is apparent from the express terms of Article 9(3) ICCPR and by implication with respect to Article 5(3) ECHR, on account of the reference to Article 5(1)(c). This requirement has been construed narrowly by the HRC,¹⁹³ as well as in the jurisprudence of the ECtHR.¹⁹⁴ The obligations under Article 9(3) ICCPR and Article 5(3) ECHR are not, therefore, of general application to all circumstances in which an individual is deprived of his liberty, but rather only to situations where an individual is detained in order to pursue criminal charges. With respect to the ACHR, although Article 7(5) ACHR does not limit itself explicitly to detention only in the case of criminal charges being brought, it was noted above that the applicability of all of the ACHR’s procedural requirements may be limited to deprivation of liberty only in certain circumstances.

¹⁹² HRC General Comment 35 (n 56) para 27.

¹⁹³ *ibid* para 31.

¹⁹⁴ Schabas (n 57) 247.

In any case, as noted by the ECtHR, ‘The fact that a detained person is not charged or brought before a court does not in itself amount to a violation of the first part of Article [5(3)]. No violation of Article [5(3)] can arise if the arrested person is released “promptly” before any judicial control of his detention would have been feasible’.¹⁹⁵ Such an approach makes obvious sense, particularly if the obligation *is* applied outside of the criminal process, as might be the case with respect to the ACHR. Given that deprivation of liberty has been interpreted so widely as to include, for example, relatively brief, routine, measures such as traffic stops, a requirement to bring the individual concerned before a judicial authority in all such situations would plainly be impractical. In such circumstances, the grounds for deprivation of liberty are likely to have expired before it can reasonably be expected that the individual can be brought before a judicial authority. Indeed, to do so may extend the deprivation of liberty beyond what would otherwise have been necessary.

Where the requirement applies, there are three important questions of interpretation. First, what characteristics must an authority have in order to meet the standards of the two provisions? Second, what does it mean to be brought ‘promptly’ before that authority, particularly in the context of a maritime security operation that may have taken place far from a State’s courts? And, third, how must the hearing be conducted? In particular, must the individual concerned be presented in person, or could the hearing be conducted remotely?

In relation to the nature of the authority before whom a detainee must be brought, it is clear from the text of all three provisions that the authority need not necessarily be a judge, but may instead be an ‘officer authorized by law to exercise judicial power’. However, in addition to being authorized under the law of the State concerned, the officer exercising judicial power must meet certain standards. These have been expressly linked by the IACtHR to the provisions under Article 8(1) ACHR relating to the right to a fair trial, requiring the officer to fulfil the requirements of ‘competence, independence, and impartiality.’¹⁹⁶ Similarly, with respect to the ICCPR and ECHR, what matters is that the

¹⁹⁵ *Brogan and Others v the United Kingdom* Series A no 145-B (ECtHR) [58] (citation omitted).

¹⁹⁶ Antkowiak and Gonza (n 57) 184.

authority is 'independent, objective and impartial in relation to the issues dealt with.'¹⁹⁷

These requirements will apply to individuals deprived of their liberty during MSOs as it does in any other context. However, a unique question raised in the maritime context is whether the standards of independence and impartiality could be met by a judicial officer deployed to a ship, rather than located ashore. As will be discussed below, the potential for individuals to be deprived of their liberty in remote locations presents a challenge with respect to the timescale within which they are brought before a judicial authority. Therefore, if a judicial officer could be located in the interdicting ship, then the delay might be reduced or eliminated.

Such an option does not, in itself, appear to be prohibited under any of the instruments, so long as the individual meets the required standards of independence and impartiality. However, to situate such an individual in a ship for any substantial amount of time is unlikely to be an attractive option in practice. This is because the requirements of independence and impartiality mean that he or she is likely to be able to do little else besides fulfil their judicial function on board the ship. They could not, for example, be part of the chain of command responsible for the detention over which they subsequently exercise judicial oversight, such as may be the case if the judicial function were a secondary duty given to a member of the regular crew. Furthermore, although there are differences in the application of the different instruments, it is unlikely that the judicial officer could also act as a prosecutor, at least not one involved in the decision to detain in the first place. Whereas the ECtHR has accepted that the required standard of independence and impartiality may, in some circumstances, be met by individuals within public prosecution departments,¹⁹⁸ the HRC has stated that 'a public prosecutor cannot be considered as an officer exercising judicial power under [Article 5(3) ICCPR].'¹⁹⁹ With respect to the

¹⁹⁷ HRC General Comment 35 (n 56) para 32 (citation omitted); Schabas (n 57) 249.

¹⁹⁸ *Schiesser v Switzerland* (1979) Series A no 34 (ECtHR) [28].

¹⁹⁹ HRC General Comment 35 (n 56) para 32 (citations omitted).

ACHR, the IACtHR has found that a prosecutor could not exercise judicial power where this would involve reviewing ‘the legality of his own orders.’²⁰⁰

Turning to the question of promptness, this is a notable issue in the maritime context given the potential for individuals to be deprived of their liberty in remote locations. In general, the view of the HRC is that, while there is no clearly defined time limit, ‘48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances.’²⁰¹ In relation to the ECHR, Schabas identifies from the relevant practice an upper limit of about four days for the delay tolerated by the ECtHR.²⁰² However, in *Brogan and others v UK*, the Court has recognised that ‘promptness is to be assessed in each case according to its special features’, although ‘the significance to be attached to those features can never be taken to the point of impairing the very essence of the right...to the point of effectively negating the State’s obligation to ensure a prompt release or a prompt appearance before a judicial authority.’²⁰³ With respect to the ACHR, Burgorgue-Larsen and Úbeda de Torres note that, although the IACtHR has referred to ‘immediate judicial control’,²⁰⁴ in practice it has developed its own standard of prompt judicial intervention.²⁰⁵ Antkowiak and Gonza identify the shortest period of detention found by the IACtHR to have been in violation of that standard to have been thirty-eight hours, in the case of a child.²⁰⁶ However, the IACtHR has also

²⁰⁰ *Palamara Iribarne v Chile* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 135 (22 November 2005) [223]. Antkowiak and Gonza reach a more definitive conclusion with respect to prosecutors, stating that ‘the Inter-American Tribunal has condemned the State practices of putting detainees before prosecutors’. Antkowiak and Gonza (n 57) 164. However, this does not fully reflect the nuance of the cases cited in support of the proposition.

²⁰¹ HRC General Comment 35 (n 56) para 33 (citations omitted).

²⁰² Schabas (n 57) 248.

²⁰³ *Brogan* (n 195) [59].

²⁰⁴ See, for example, *Tibi* (n 191) [114].

²⁰⁵ Burgorgue-Larsen and de Torres (n 176) para 19.20

²⁰⁶ Antkowiak and Gonza (n 57) 165 (citing *Landaeta Mejías Brothers et al v Venezuela* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 281 (27 August 2014) [178]).

acknowledged the relevance of considering the 'special features' of a case, citing the passage above from the ECtHR's decision in *Brogan and others*.²⁰⁷

Such special features are likely to exist in the case of deprivation of liberty in the course of MSOs, as reflected in the ECtHR's decisions in *Rigopolous*, *Medvedyev* and *Vassis*, which together provide detailed guidance on the application to MSOs of Article 5(3) ECHR, and, by extension, the right to prompt judicial review more generally.²⁰⁸ In *Rigopolous*, a period of sixteen days to transfer the applicant 5,500km by sea did not amount to a breach of Article 5(3) in light of the 'wholly exceptional circumstances',²⁰⁹ which meant that it had been 'materially impossible to bring the applicant physically before the investigating judge any sooner'.²¹⁰ The Court considered the applicant's suggestion that a handover to have been conducted with UK authorities located on Ascension Island (closer than Spain, but still 890 nautical miles from the location where the vessel was boarded) to have been 'unrealistic'.²¹¹ It does seem, however, that the Court considered Spain to have done all that it feasibly could to protect the rights of the applicant. It noted, for example, that 'once he had arrived at Las Palmas, the applicant was transferred to Madrid by air and that he was brought before the judicial authority on the following day'.²¹² Furthermore, the applicant's detention was regularised by the Central Investigating Court in Spain during the period at sea and, while the applicant disputed some of the facts, the Government claimed that he was both informed of the basis for his detention and provided with access to legal advice.²¹³ Therefore, although the applicant was not brought physically before a judicial authority until his arrival in Spain, such as to satisfy his rights under Article 5(3), his detention was nevertheless conducted within a framework of judicial control.

Similarly, in *Medvedyev*, a majority of nine to eight concluded that a delay of thirteen days at sea, covering a similar distance to that in *Rigopolous*, followed by eight or nine hours in custody in France, did not amount to a violation of

²⁰⁷ *Tibi* (n 191) [115].

²⁰⁸ See, for discussion of this aspect of *Medvedyev* and *Rigopoulos*, Treves (n 118) 7–8.

²⁰⁹ *Rigopoulos* (n 13).

²¹⁰ *ibid.*

²¹¹ *ibid.*

²¹² *ibid.*

²¹³ *ibid.*

Article 5(3).²¹⁴ As in *Rigopolous*, key to this decision was the finding that the French authorities took no longer than necessary to escort the vessel containing the detainees to France.²¹⁵ The majority again rejected the applicants' argument that the French authorities ought to have taken certain measures to reduce the delay. In particular, it was suggested that the detainees could have been transferred from their own ship to the French vessel; however, the majority concluded, 'As to the idea of transferring them to a French naval vessel to make the journey faster, it is not for the Court to assess the feasibility of such an operation in the circumstances of the case, particularly as it has not been established that the frigate was capable of accommodating all the crew members in sufficiently safe conditions.'²¹⁶ Most notable in this regard is not only the margin of appreciation afforded to the French authorities, but the apparent acceptance of their judgment as to the feasibility of options to reduce the delay.

The minority in *Medvedyev*, however, took a different view, concluding that Article 5(3) had been violated.²¹⁷ They sought to distinguish *Rigopolous* on the grounds that, in the earlier case, the applicant's detention had been supervised by the Central Investigating Court and the applicant had, for example, been kept informed and given access to a lawyer, whereas in *Medvedyev* the only supervision was by a public prosecutor on board the interdicting ship. They also drew attention to the fact that the lawfulness of the detention in *Rigopolous* was never in question.²¹⁸ Furthermore, although the minority accepted that 'wholly exceptional circumstances' might justify a delay longer than that normally permitted, this 'connotes, if not "insurmountable" or "insuperable", then, at least, circumstances in which the authorities could not reasonably envisage or execute any other measures in order to comply with their obligations under the Convention.'²¹⁹ The minority considered that, in the circumstances, options were available to reduce the delay: given the reasonable foreseeability of what

²¹⁴ *Medvedyev* (n 14) [131]–[134].

²¹⁵ *ibid* [131].

²¹⁶ *ibid* [131].

²¹⁷ *Ibid*, Joint Partly Dissenting Opinion of Judges Tulkens, Bonello, Zupančič, Fura, Spielmann, Tsotsoria, Power and Poalelungi [1].

²¹⁸ *Ibid*, Joint Partly Dissenting Opinion of Judges Tulkens, Bonello, Zupančič, Fura, Spielmann, Tsotsoria, Power and Poalelungi [5].

²¹⁹ *Ibid*, Joint Partly Dissenting Opinion of Judges Tulkens, Bonello, Zupančič, Fura, Spielmann, Tsotsoria, Power and Poalelungi [6].

was to transpire, a judicial officer could have been embarked in the interdicting ship at some point before the interdiction of the *Winner*; alternatively, the detainees could have been transferred to the interdicting ship, or airlifted to France, the latter noted as an option previously used by France for suspected pirates.²²⁰ These options were not exhaustive, but rather intended by the minority to emphasise that ‘far from doing *everything possible* to bring the applicants promptly before a judge, there is no evidence at all that the above or any alternative measures were even contemplated.’²²¹

Turning to *Vassís*, the case, decided by the Fifth Section sitting as a Chamber, concerned a period of eighteen days at sea, followed by 48 hours in police custody ashore before the applicants were brought before a judge. It is noteworthy that the (unanimous) decision cites the relevant part of the majority decision in *Medvedyev* in full.²²² Notwithstanding the minority position in the earlier case, the Court in *Vassís* referred again to the ‘wholly exceptional circumstances’ present in both *Rigopoulos* and *Medvedyev*, concluding that there was ‘nothing to suggest that its diversion to France took any longer than necessary’, and again dismissed the suggestion that other options ought to have been explored, stating that, ‘As for the other possible scenarios, it is not for the Court to assess their feasibility in the specific circumstances of the case.’²²³ Although not stated explicitly, it seems clear that the Court therefore considered the period of eighteen days at sea not to be in violation of Article 5(3). However, it went on to consider the period of 48 hours ashore, for which it found there to have been ‘no justification for such an additional delay of some forty-eight hours under the circumstances of the case.’²²⁴ Given the delay already incurred by the journey to France, and the opportunity this presented to prepare for the applicants’ arrival, ‘as soon as the applicants arrived in France they should have been brought, without delay, before a “judge or other officer authorised to exercise judicial power”.’²²⁵

²²⁰ Ibid, Joint Partly Dissenting Opinion of Judges Tulkens, Bonello, Zupančič, Fura, Spielmann, Tsotsoria, Power and Poalelungi [8]–[9].

²²¹ Ibid, Joint Partly Dissenting Opinion of Judges Tulkens, Bonello, Zupančič, Fura, Spielmann, Tsotsoria, Power and Poalelungi [10].

²²² *Vassís* (n 15) [52].

²²³ *ibid* [55].

²²⁴ *ibid* [59].

²²⁵ *ibid* [60].

From these judgments, it is clear that the need to transfer detainees long distances by sea can amount to ‘wholly exceptional circumstances’, such as to justify a delay in bringing individuals before a judicial authority.²²⁶ Although the eighteen-day delay incurred during the sea voyage in *Vassís* provides a useful upper point of reference, the Court’s reasoning across all three cases implies that there is no particular limit to the delay that may be incurred. What is important is that the delay is no longer than necessary in the circumstances. With respect to this standard, although noting the views of the minority in *Medvedyev*, the Court’s judgments have consistently deferred to the States concerned with respect to the feasibility of proposed measures that could have been taken to reduce the length of the delay. Similarly, although the Court noted the judicial oversight present during the period of the voyage in *Rigopolous*, the absence of similar measures in either *Medvedyev* or *Vassís* did not give rise to a violation of Article 5(3). Clearly, however, it follows from the decision in *Vassís* that much less flexibility is afforded States once the transfer by sea is complete.

Notwithstanding the apparent endorsement of the majority judgment in *Medvedyev* by the Chamber in *Vassís*, the dissenting opinion of such a significant minority of the Grand Chamber in the earlier case may nevertheless influence future development of the law with respect to Article 5(3) ECHR. It may also provide the basis for divergence in the approach taken in other human rights systems when similar situations come to be considered. In particular, noting the apparently reasonable options proposed by the minority, there may be a limit to the extent to which future courts will be willing to defer to States, particularly if obviously practicable steps for reducing delay are not taken, and the State concerned cannot explain why. Considering the minority opinion, it is clear that its point of departure from the majority view relates to the measures that a State might be expected to take to either reduce or mitigate the period of delay in bringing individuals deprived of their liberty before a judicial authority. With respect to *reducing* delay, the implication is that the Court ought to be more searching with respect to the feasibility of an open-ended range of measures, including embarkation of the judicial authority on the interdicting ship, or the use of faster means to transfer individuals to the destination State.

²²⁶ Treves (n 118) 7–8.

The point was not that such measures must invariably be taken, but rather that the State would be expected to demonstrate that it genuinely had done all it could to reduce delay. This, it is submitted, would help to mitigate a lacuna in protection, without placing an undue burden on the State concerned.

With respect to *mitigating* delay, the minority placed significant emphasis on the judicial oversight provided in *Rigopoulos* during the voyage. It is notable in this respect that both the ECtHR and HRC have referred to the requirement to bring an individual *physically* before the judicial authority.²²⁷ The use, therefore, of teleconferencing facilities, or other means, to communicate with a judicial authority located elsewhere, would not be sufficient to meet the procedural requirement. Nevertheless, the minority opinion in *Medvedyev* implied that a lengthy delay in bringing individuals before a judicial authority could be mitigated through measures including remote judicial oversight and access to legal advice. Although not stated in express terms, and without removing the obligation also to take measures to *reduce* delay in bringing individuals before judicial authorities, the implication is that the use of such measures might be required in the case of lengthy delays. Indeed, it is submitted that to deliberately choose not to use such methods, if they are reasonably available to mitigate unavoidable delay, would be perverse.

Therefore, although the jurisprudence of the ECtHR relating to Article 5(3) suggests that States will be afforded considerable latitude in meeting this obligation when individuals are deprived of their liberty in the course of MSOs, there is potential for a stricter approach to be adopted by other courts or by the ECHR in future cases. Reliance on the approach taken by the majority in *Medvedyev* may be misplaced and States might be well-advised to consider innovative options to reduce or mitigate delay in bringing individuals before judicial authorities. At the very least, States ought to be able to explain in detail why such measures were not feasible.

²²⁷ *Rigopoulos* (n 13); HRC General Comment 35 (n 56) para 34 (citations omitted).

5.4.6.3. *The right of detainees to challenge the lawfulness of their detention (Article 9(4) ICCPR, Article 5(4) ECHR and Article 7(6) ACHR)*

There is obvious overlap between Articles 9(3) ICCPR, 5(3) ECHR and 7(5) ACHR on the one hand, and Articles 9(4) ICCPR, 5(4) ECHR and 7(6) ACHR on the other. Both sets of rights relate broadly to a right for the lawfulness of detention to be reviewed. However, whereas Articles 9(3), 5(3) and 7(5) provide for an automatic obligation to bring individuals detained on the basis of criminal charges before a judicial authority, Articles 9(4), 5(4) and 7(6) contain a right of broader application for all detainees to have the lawfulness of their detention reviewed. It is notable that the latter right was not considered in the *Medvedyev*, *Rigopoulos* or *Vassis* judgments, although the reason for this is not clear. It is plausible that it was assumed merely to duplicate the complaints relating to Article 5(3); however, Article 5(4), as well as its equivalents under the other instruments, arguably provides an additional right that may be exercised *before* an individual is brought before a judicial authority so as to satisfy Article 5(3).

The reviewing authority is stated in all three instruments as a ‘court’. In practice this has been interpreted by the HRC as meaning that the deciding authority ‘should ordinarily be a court within the judiciary’, but exceptionally may be a specialized tribunal, so long as it is ‘independent of the executive and legislative branches or enjoys judicial independence in deciding legal matters in proceedings that are judicial in nature.’²²⁸ Similarly, the ECtHR emphasises that the court must have ‘a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question’.²²⁹ Likewise, the IACtHR requires the decision to be taken by the judiciary, and not a military, administrative or political body.²³⁰ As noted above with respect to the previous obligation, it is unlikely to be practicable to locate such an individual in a ship at sea for long periods of time, but he or she could plausibly be deployed to a ship to deal with a specific situation.

All three instruments require timely consideration of the application. Under Article 9(4) ICCPR and Article 7(6) ACHR, the application must be decided

²²⁸ HRC General Comment 35 (n 56) para 45 (citations omitted).

²²⁹ *Trzaska v Poland* App No 25792/94 (ECtHR, 11 July 2000) [74]. See also *Schabas* (n 57) 254–55.

²³⁰ *Antkowiak and Gonza* (n 57) 168.

‘without delay’, while, under Article 5(4), ECHR the application ‘shall be decided speedily’. Notably, however, there does not seem to be the same requirement for a hearing in the physical presence of the detainee as there is under Article 9(3) ICCPR, Article 5(3) ECHR and Article 7(5) ACHR. While the HRC states that ‘In general, the detainee has the right to appear in person before the court’ and that ‘The court must have the power to order the detainee brought before it’, it does not specify that the detainee must be ‘physically’ present as it does in respect of Article 9(3).²³¹ In the context of MSOs and deprivation of liberty during a transfer to a destination State, it is arguable that the physical dislocation of the individual concerned would not necessarily justify a delay in fulfilling the right to challenge the lawfulness of the deprivation of liberty. Hence, the ‘wholly exceptional circumstances’ that justified a delay in meeting the States’ obligations under Article 5(3) ECHR in the *Medvedyev*, *Rigopoulos* and *Vassīs* cases, would not apply in the case of Article 5(4) and its equivalents under the other instruments.

There is an obvious connection here to the mitigation measures suggested above as a potential requirement to avoid violation of Article 5(3) ECHR and its equivalents. However, it is arguable that Article 5(4) presents an alternative, more direct, basis for challenging deprivation of liberty during lengthy transfers from the point at which individuals are deprived of their liberty in the course of an MSO to a destination State.

5.5. Conclusion

Individuals may be deprived of their liberty for a wide variety of reasons in the course of MSOs. Such measures are authorised, either directly or indirectly, in a variety of circumstances under the law of the sea. However, these authorisations are accompanied by differing obligations with respect to the protection of the affected individual, usually with little detail and sometimes with broad reference to adherence to other bodies of law, such as IHRL.

On the other hand, assuming it applies, IHRL contains a number of rights of potential application. The foregoing analysis has concentrated on the right to liberty and security of the person, notwithstanding that other rights may be

²³¹ HRC General Comment 35 (n 56) para 42.

engaged, particularly with respect to the treatment of those who have been deprived of their liberty. Applying the right to liberty in the context of MSOs exposes a number of issues; however, unusually amongst the rights considered in this thesis, it has been the subject of relatively detailed judicial scrutiny in that context, at least with respect to Article 5 ECHR.

As well as the applicability of the instruments concerned, discussed in Chapters Two and Three, a second important threshold issue arises with respect to the right to liberty, namely the circumstances that will engage the right. Although there are situations in which an individual will clearly have been deprived of their liberty, such as when he or she is confined to a cell on a ship at sea, other situations are less clear. In particular, where control is exerted over an interdicted vessel, this may be argued to amount to a deprivation of liberty of those on board. Although somewhat tentative, the potential for the right to liberty to be engaged in such circumstances is supported both by the consideration of such a situation by the ECtHR in *Medvedyev*, as well as by the broader practice concerning the application of the ECHR, and other instruments, in analogous situations.

Where the right to liberty is engaged, each of the instruments imposes requirements on the measures that are taken, including that they be lawful, not arbitrary and, in the case of the ECHR, aligned with one of several specified grounds. With respect to MSOs, the lawfulness requirement raises some important issues in light of the wide range of potential legal bases for deprivation of liberty in that context. While domestic legislation, such as the Australian MPA 2013, will arguably satisfy the lawfulness requirement most clearly, for at least some of the human rights treaties under consideration it is arguably not necessary. Nevertheless, while other sources of law, including international law, may plausibly provide a satisfactory legal basis to meet the requirement of lawfulness, they are less likely to set out sufficient detail with respect to the procedure to be followed.

Even where deprivation of liberty is lawful, it may still violate the right to liberty if it is arbitrary, which this chapter discussed primarily by reference to the express grounds set out in Article 5 ECHR. Where individuals are deprived of their liberty in order to pursue criminal prosecution, this requirement is likely to be

met so long as the measures taken are proportionate. However, in other cases, the most plausible of the specified grounds is that relating to fulfilment of a legal obligation. This will potentially be relevant to a wide range of situations arising in the course of MSOs, such as when individuals are deprived of their liberty as a necessary consequence of an interdiction. However, following a similar theme to the requirement of lawfulness, the obligation in question needs to be clearly specified.

Finally, the chapter considered a range of procedural obligations set out in the relevant provisions of the ICCPR, ECHR and ACHR, and which may be applied in practice in connection with the ACHPR. In connection with MSOs, the most notable of these relates to the obligations to bring those deprived of their liberty promptly before a judicial authority, and to allow such individuals to challenge the lawfulness of their detention. Where individuals are deprived of their liberty at sea, this may occur in particularly remote locations, meaning that States may be unable to meet standards of promptness developed in a domestic, land-based, context. Decisions of the ECtHR demonstrate notably flexibility in applying the law to such 'wholly exceptional circumstances', as well as a remarkable willingness on the part of the Court to defer to the State concerned in determining what measures may be feasible to reduce delay. However, it is by no means certain that other Courts or treaty bodies will be so forgiving, or, indeed, that the ECtHR will not become more demanding as its practice develops.

6. Rescue

6.1. Introduction

This chapter concerns the provision of assistance to those in distress at sea, in particular the question whether and when international human rights law (IHRL) imposes an obligation to provide such assistance, as well as the substance of any obligation. This issue can arise in a number of different contexts in connection with maritime security operations (MSOs). At the most basic level, ships engaged in MSOs may encounter vessels in distress in the course of their operations. The presence of such vessels, and their state of distress, may be unrelated to the MSO; this would be the case, for example, when a ship conducting an MSO is in the vicinity of a vessel that has suffered an incident on board, such as a fire, flood or engine failure.

On the other hand, the distress situation may be closely connected to the MSO, such as when a vessel is in distress as a result of a maritime security threat, such as piracy, or where action taken by a ship conducting a MSO itself causes a situation of distress, such as when it uses force against a vessel, causing injury or damage.¹ Alternatively, situations of distress may be intrinsically linked to the issue with which particular MSOs are concerned. Notably, this is the case in some situations of irregular migration,² in which individuals attempting to reach a country by sea make use of overloaded or unseaworthy vessels,

¹ See above ch 4.

² Irregular migration is defined by the International Organization for Migration as:

Movement that takes place outside the regulatory norms of the sending, transit and receiving countries. There is no clear or universally accepted definition of irregular migration. From the perspective of destination countries it is entry, stay or work in a country without the necessary authorization or documents required under immigration regulations. From the perspective of the sending country, the irregularity is for example seen in cases in which a person crosses an international boundary without a valid passport or travel document or does not fulfil the administrative requirements for leaving the country. There is, however, a tendency to restrict the use of the term "illegal migration" to cases of smuggling of migrants and trafficking in persons.

sometimes with the intention that this will lead to their rescue and transfer to a desired destination State. In such a situation, as is the case in general, once an individual has been rescued, the rescuing State may owe obligations not to transfer him or her to particular States where there exists a risk of certain violations of his or her human rights.³

The potential for rescue to provide the ‘final leg’ of an irregular migration route, either by design or accident, means that States may be wary of conducting rescue operations that may have the effect, or at least perceived effect, of encouraging irregular migration by such methods. More broadly, in any situation when a ship goes to the assistance of a vessel in distress, its actions will almost inevitably come at some cost, at least in terms of time and opportunity. For the ship involved and its owner or operator, whether they be a State or private entity, rescue operations can be extremely disruptive, especially where the options for the disposition of those rescued are limited or unclear.

In recent years, issues surrounding the provision of assistance to those in distress have been especially prominent with respect to irregular migration from the north coast of Africa, particularly Libya, to southern Europe. During one year alone, 2011, at least fifteen hundred people were reported to have lost their lives while attempting to cross the Mediterranean.⁴ In one particularly notorious incident, sometimes referred to as the ‘left-to-die boat’,⁵ a small boat that had left Libya with seventy-two individuals on board was found back on Libya’s shores fifteen days later with just nine survivors.⁶ The boat had come into

³ See below ch 7.

⁴ Council of Europe Committee on Migration, Refugees and Displaced Persons, ‘Lives Lost in the Mediterranean Sea: Who is Responsible’ (29 March 2012) (CoE Report) 1.

⁵ See, for example, Francesco Messineo, ‘The “Left-to-Die Boat”: Whose Responsibility for the Death of 63 Migrants in the Mediterranean?’ (*EJIL: Talk!*, 31 March 2012) <<https://www.ejiltalk.org/the-left-to-die-boat-whose-responsibility-for-the-death-of-63-migrants-in-the-mediterranean/>> accessed 5 July 2018.

⁶ The facts are recounted at CoE Report (n 4) 6–10. See also Jack Shenker and Giles Tremlett, ‘Migrant Boat Disaster: Spain Challenges Nato Over Distress Call Claim’ (*The Guardian*, 29 March 2012) <<https://www.theguardian.com/world/2012/mar/29/migrant-boat-disaster-spain-nato>> accessed 5 July 2018; ‘Nato “Failed to Aid” Libyan Migrant Boat – Council of Europe Report’ (BBC News, 29 March 2012) <<http://www.bbc.co.uk/news/world-europe-17548410>> accessed 5 July 2018.

difficulties off the Libyan coast at the start of its journey to Europe; despite various authorities having been aware of its situation, it had not been rescued.

A report prepared for the Parliamentary Assembly of the Council of Europe identified ‘a catalogue of failures’ that contributed to the tragedy, with ‘many opportunities for saving the lives of the persons on board the boat [having been] lost.’⁷ According to the report, Maritime Rescue Coordination Centres in both Rome and Malta were made aware of the boat’s situation,⁸ and information was also passed to NATO, which was operating in the area in connection with the conflict in Libya.⁹ Furthermore, there was evidence that military and civilian aircraft and ships were operating in the vicinity, and that some, including a large military ship, were aware of the boat and its difficulties;¹⁰ indeed, an unidentified helicopter provided limited assistance by lowering water and biscuits to the boat in distress.¹¹ Nevertheless, no rescue operation was mounted. Although, as the report concluded, nobody involved questioned ‘the basic obligation to rescue at sea’, the incident demonstrated ‘that there are gaps in both law and practice concerning rescue at sea which need to be remedied.’¹²

This chapter will not examine the ‘left-to-die boat’ incident in detail; less still will it attempt to attribute responsibility. However, the case both highlights the relevance, in general, of the issue of assistance to those in distress, and demonstrates why the existence of an obligation under IHRL would be significant.¹³ Although, as will be discussed, States may violate the law of the sea when they fail to meet obligations connected to the provision of assistance to those in distress, individual recourse to a remedy to those affected by such a violation is limited or non-existent. However, if an obligation exists under IHRL,

⁷ CoE Report (n 4) 1.

⁸ Maritime Rescue Coordination Centres (MRCCs) are the authorities established by States to discharge their responsibility for search and rescue within designated areas under the SAR Convention, on which see below. In this case, the boat in question was not located in the area for which the Rome MRCC is responsible, but rather was in the area for which the Tripoli MRCC was notionally responsible; however, the Tripoli MRCC was not functioning at the time. CoE Report (n 4) 12–13.

⁹ *ibid* 17–19.

¹⁰ *ibid* 15–16.

¹¹ *ibid* 15–16.

¹² *ibid* 22.

¹³ This possibility was tentatively suggested in response to the publication of the Council of Europe report. Messineo (n 5).

then a route for making an individual complaint may be available, depending on the human rights system in question.

Numerous human rights obligations may be engaged once States (or even merchant vessels) have rescued those in distress at sea. In particular, the principle of *non-refoulement* will be central to determining the options available to States dealing with situations where irregular migrants are rescued and therefore come within the power of the State.¹⁴ Where individuals are detained following rescue, noting the broad definition given to the concept of detention,¹⁵ the conditions in which they are held will be subject to the same human rights considerations as other situations of detention. This chapter, however, will concentrate on the question whether a State owes obligations under human rights law to assist those in distress.

The chapter will begin by discussing the duty to render assistance under the law of the sea, examining the legal basis and scope of the duty in both treaty and customary law, addressing, in particular, the question whether the law of the sea contains an individual right to be rescued. In common with other chapters in this thesis, this will both place any IHRL obligation in context and also provide a basis for comparison. The chapter will then proceed to examine whether a duty to render assistance can be found in human rights law. In order to do so, it will first discuss the positive obligations that States owe generally under the right to life, concluding that this extends to situations of distress at sea. It will then proceed to examine the complicated question of applicability, examining in particular the circumstances in which a vessel in distress may fall within a State's jurisdiction such that human rights obligations are engaged. Next, the chapter will seek to identify the content of the obligations owed by States under IHRL to vessels in distress, before briefly comparing and contrasting this with the duties found in the law of the sea.

¹⁴ See below ch 7.

¹⁵ See above s 5.4.3.

6.2. The Provision of assistance to those in distress under the law of the sea

The law of the sea has long recognised a duty to render assistance to those in distress. In treaty law it is set out in Article 98 of the United Nations Convention on the Law of the Sea (UNCLOS):¹⁶

- (1) Every State shall require the master of a ship sailing under its flag, insofar as he can do so without serious danger to the ship, the crew or the passengers:
 - (a) To render assistance to any person found at sea in danger of being lost;
 - (b) To proceed with all possible speed to the rescue of persons in distress if informed of their need of assistance, insofar as such action may reasonably be expected of him;
 - (c) After a collision, to render assistance to the other ship, her crew and her passengers and, where possible, to inform the other ship of the name of his own ship, her port of registry and the nearest port at which she will call.
- (2) Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.

This replicates an equivalent article in the 1958 Convention on the High Seas,¹⁷ which was itself based on similar provisions in earlier treaties.¹⁸ The duty as set out in UNCLOS has two components: an obligation on States in Article 98(1) to require masters of ships flying their flag to render assistance in certain circumstances; and the obligation on coastal States in Article 98(2), with respect to the provision of search and rescue services.¹⁹ Both of these are reflected in other treaties. The duty of masters to render assistance is also reflected in the

¹⁶ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS).

¹⁷ Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11 art 12(1).

¹⁸ Mark Pallis, 'Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes' (2002) 14 Intl J of Refugee L 329, 331.

¹⁹ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS) art 98.

Salvage Convention,²⁰ and given greater detail in the International Convention for the Safety of Life at Sea (SOLAS Convention).²¹ Similarly, the Article 98(2) obligation is reflected in the 1979 International Convention on Maritime Search and Rescue (SAR Convention).²² As well as its basis in treaty law, the duty to render assistance is also generally considered a rule of customary law.²³

In terms of geographical scope, the fact that the Article 98 UNCLOS replicates the earlier provision in the Convention of the High Seas is reflected in its inclusion in Part VII, which deals purportedly with the high seas (and is applied in part, by virtue of Article 58, to the exclusive economic zone). This has led some to doubt its applicability landward of the high seas and exclusive economic zone, particularly in the territorial sea.²⁴ However, the reference to those ‘found *at sea*’ in Article 98(1)(a),²⁵ coupled with indirect reference to the provision of assistance in the territorial sea in Article 18,²⁶ has led to a commonly accepted view that ‘the duty to render assistance exists throughout the ocean, whether in the territorial sea, in straits used for international navigation, in archipelagic waters, in the exclusive economic zone or on the

²⁰ International Convention on Salvage (concluded 28 April 1989, entered into force 14 July 1996) 1953 UNTS 165 (Salvage Convention) art 10. The Salvage Convention does not apply to warships and other sovereign immune vessels unless the State concerned chooses for it to do so. *ibid* art 4(1).

²¹ International Convention for the Safety of Life at Sea (concluded 1 November 1974, entered into force 25 May 1980) 1184 UNTS 277 (SOLAS) annex, ch 5, reg 33. Reg 33 expands on the UNCLOS provision to include, notably, an obligation on masters to record reasons in their log-books for not proceeding to the assistance of a vessel in distress. However, the relevant provisions of SOLAS do not bind warships and other sovereign immune vessels. *ibid* annex, ch 5, reg 1(1). Notably, both the Salvage Convention and SOLAS refer to a duty directly on the Master, rather than just on the State, though it is unclear how an individual’s violation of these rules could be dealt with, other than via a State’s domestic law.

²² International Convention on Maritime Search and Rescue (concluded 27 April 1979, entered into force 22 June 1985) 1405 UNTS 97 (SAR Convention).

²³ Pallis (n 18) 333–34; Seline Trevisanut, ‘Is there a Right to be Rescued at Sea? A Constructive View’ (2014) *Zoom-in 4 Questions of Intl L* 3, 5.

²⁴ Pallis (n 18) 335.

²⁵ *Emphasis added.*

²⁶ Art 18 refers to a right for ships to stop and anchor in the territorial sea where they do so to render ‘assistance to persons, ships or aircraft in danger or distress’. UNCLOS (n 16) art 18.

high seas. Assistance is to be given to any person, ship or aircraft in distress.²⁷ Further support for this position comes from the equivalent provision of the Salvage Convention being applicable 'in navigable waters or in any other waters whatsoever',²⁸ and the SOLAS Convention provisions apply to 'all ships on all voyages',²⁹ except those 'operating solely in waters landward of the baseline', to which the flag State may choose to apply them.³⁰ Furthermore, the obligation generally applies to warships, as well as commercial vessels.³¹

The duty to render assistance in the law of the sea is therefore broad in its scope. The Article 98(1) requirement for masters to provide assistance applies wherever they are and contains obligations both to rescue those that they *encounter* in danger of being lost, as well as to *proceed* to the assistance of those in distress. However, these obligations, alone, do not amount to any sort of general duty on the part of the State to rescue those in distress. They arise only where a vessel flying a State's flag happens to be sufficiently close to a situation of distress such that it can reasonably be expected to assist.³² Only in that limited situation will a State have failed to meet its obligations under Article 98(1) if it does not require the master of the ship to provide assistance. If there are no vessels flagged to a particular State that are reasonably able to respond, then that State cannot be responsible for a violation of Article 98(1) UNCLOS.

Article 98(2) UNCLOS comes closer to creating a general obligation on the part of States to rescue those in distress, requiring States to take positive action to create and maintain a system for providing search and rescue services. Therefore, while the Article 98(1) obligation applies only so far as a State has

²⁷ Satya N Nandan and Shabtai Rosenne (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol 3 (Martinus Nijhoff 1995) para 98.11g.

²⁸ Salvage Convention (n 20) art 1(a).

²⁹ SOLAS (n 21) annex, ch 5, reg 1(1).

³⁰ *ibid* annex, ch 5, reg 1(2). As noted above, the relevant provisions of SOLAS do not bind warships and other sovereign immune vessels. *ibid* annex, ch 5, reg 1(1).

³¹ Irini Papanicolopulu, 'The Duty to Rescue at Sea, in Peacetime and in War: A General Overview' (2016) 98(2) *Intl Rev of the Red Cross* 491, 495–97. It is important to note, however, that the incorporation of the duty in some treaties, such as the SOLAS Convention, excludes its application to warships.

³² A standard that is vague in its practical application, noting the significant cost that may attach to even a short delay in the voyage of a large commercial vessel.

flagged vessels within a reasonable distance of those in distress (albeit that it applies wherever those vessels may be), the Article 98(2) duty requires States to make provision for search and rescue services, or at least to take steps to ensure that such services are in place. This obligation is also reflected in the SAR Convention,³³ which goes further in providing a detailed framework for the provision of search and rescue services, including cooperation between States in such matters. Importantly, it provides for the division of the ocean into search and rescue regions,³⁴ for which rescue coordination centres exercise responsibility for the conduct of search and rescue operations.³⁵

In itself, Article 98(2) UNCLOS is an obligation only for States to establish and maintain search and rescue services. As such, it falls short of establishing a concrete obligation to rescue particular individuals in distress. However, such an obligation is arguably found in certain provisions of the SAR Convention, which requires, *inter alia*, that:

- 2.1.9 On receiving information that a person is in distress at sea in an area within which a Party provides for the overall co-ordination of search and rescue operations, the responsible authorities of that Party shall take urgent steps to provide the most appropriate assistance available.
- 2.1.10 Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found.³⁶

These provisions require, beyond the mere creation of a system for the provision of search and rescue services, the allocation of resources to deal with specific instances of distress.

Nevertheless, although these provisions arguably amount to a concrete obligation on the part of States to ensure that individuals within their search and rescue areas are given assistance, they still contain a significant lacuna with respect to the subsequent disembarkation of those individuals. Indeed, until 2004 there was no specific provision dealing with the disposition of those who

³³ SAR Convention (n 22) annex, para 2.2.1–2.2.2.

³⁴ *ibid* annex, para 2.1.4.

³⁵ *ibid* annex, para 2.3.

³⁶ *ibid* annex, paras 2.1.9–2.1.10.

had been rescued, leading to situations where merchant vessels that had taken individuals in distress onboard were refused permission to disembark them in nearby coastal States. Perhaps most notoriously, in 2001 a Norwegian-flagged vessel, the MV *Tampa*, rescued a number of Indonesian nationals off the coast of Australia, but were refused permission by Australian authorities to disembark those it had rescued.³⁷ The reasoning of Australia was that the rescued individuals were no longer in a situation of distress and therefore that any obligation had been discharged. To some extent, the issues raised by the *Tampa* incident were addressed in 2004, through amendments to the SOLAS Convention, which provided that

Contracting Governments shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage, provided that releasing the master of the ship from the obligations under the current regulation does not further endanger the safety of life at sea. The Contracting Government responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases the relevant Contracting Governments shall arrange for such disembarkation to be effected as soon as reasonably practicable.³⁸

While these amendments, in particular the reference to delivery to a 'place of safety', go some distance to addressing the problem of disembarkation, they do not contain an obligation on the part of any particular State to allow disembarkation on its own shores.

Notwithstanding the specific issue of disembarkation, can it be argued that the law of the sea contains or reflects an individual right to be rescued? For Papastavridis, the obligations bound up in the duty to render assistance are 'of the legal nature of obligations of means rather than of result, which have to be met in due diligence.'³⁹ This distinction, derived from civil law systems, is similar

³⁷ Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (2nd edn, Bloomsbury 2016) 57–58.

³⁸ SOLAS (n 21) annex, ch 5, reg 33(1.1).

³⁹ Efthymios D Papastavridis, 'Is there a Right to be Rescued at Sea? A Skeptical View' (2014) *Zoom-in 4 Questions of Intl L* 17, 22. The language used here reflects civil law principles.

to that found in the law of State responsibility between obligations of conduct and obligations of result,⁴⁰ albeit that ‘obligations of means’ refers specifically to the allocation of a particular amount of resources.⁴¹ Because of this, Papastavridis argues that, on the face of the relevant provisions, ‘there is no individual “right to be rescued” under [UNCLOS] and other maritime conventions; the sole implicit reference within these instruments to the rights of the persons in distress may be that the latter should be disembarked in a “place of safety”.’⁴² This, however, does not necessarily follow. Individual rights give rise not only to obligations of result, but also those that might be characterised as obligations of means, requiring the investment of resources rather than the achievement of a particular result. Indeed, this is precisely the nature of many positive obligations owed by States under human rights law.⁴³ Furthermore, Papastavridis does not appear to have considered the provisions of the SAR Convention, cited above, that purport to require States to take action in individual situations of distress.

Nevertheless, even if it can be argued that the law of the sea does contain or reflect a right to be rescued, the crucial point is that the responsibility of a State for violations of that right cannot be invoked by individuals, who ‘as a general rule lack standing to assert violations of international treaties in the absence of a protest by the state of nationality’.⁴⁴ Although treaties may provide mechanisms for their enforcement by individuals and other non-State entities,⁴⁵ this is not generally the case, and is not the case with respect to the obligations under discussion in the law of the sea. Therefore, while a breach attributable to

⁴⁰ James Crawford, *State Responsibility: The General Part* (CUP 2013) 220–23.

⁴¹ See, for a discussion of the term in one particular context in the French (civil law) legal system, Christian Rothhahn, ‘Liability Outsourcer under Obligation de Resultat’ (*Bird & Bird*, 6 September 2006) <<https://www.twobirds.com/en/news/articles/2006/liability-outsourcer-under-obligation-de-resultat>> accessed 5 July 2018.

⁴² Papastavridis (n 39) 22.

⁴³ See, for example, Nigel Rodley, ‘Integrity of the Person’ in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, OUP 2014) 183, 191; Dinah Shelton and Ariel Gould, ‘Positive and Negative Obligations’ in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 577–82.

⁴⁴ Malcolm N Shaw, *International Law* (7th edn, CUP 2014) 189.

⁴⁵ *ibid* 548–49.

a State will give rise to an internationally wrongful act,⁴⁶ it will generally only be another State that will be able to invoke the violating State's responsibility.⁴⁷ In concrete terms, this means that where a State is in breach of its obligations under the law of the sea to provide assistance to those in distress, the individual affected will be unable to invoke the responsibility of that State and seek a remedy from it. Instead, any claim would have to be pursued by a State that can be said to have been injured by the alleged internationally wrongful act, most plausibly the State of nationality of the affected individual. Even where a mechanism for the settlement for disputes between States exists, such as under the optional provisions of Part XV of UNCLOS, the ability for an individual to seek redress will depend on the cooperation of an injured State, which may be impossible where, for example, the affected individual is a national of a failed State. If, however, an obligation to provide assistance to those in distress arises under IHRL, then, depending on the treaty system in question, it may be enforceable by individuals. It is to this question that the chapter now turns.

6.3. The duty to rescue under IHRL

Positive obligations arise under many human rights.⁴⁸ However, as this section will demonstrate, it is under the right to life that obligations most relevant to an obligation to rescue those in distress at sea are likely to arise.

6.3.1. *Particular applicability issues*

Chapters Two and Three explained that human rights norms are capable of both territorial and extraterritorial application; although the limited application of human rights to the maritime domain within the practice of human rights courts and supervisory bodies means that the subject is not fully resolved in all circumstances, it is informed by relatively well-developed principles. With respect to the territorial application of the treaties under consideration, a State's obligations under the treaties under consideration can persuasively be argued

⁴⁶ International Law Commission, 'Articles on Responsibility of States for Internationally Wrongful Acts' (2001) UN Doc A/56/10, 20 (ARSIWA) art 2.

⁴⁷ *ibid* art 42.

⁴⁸ On the nature of obligations under IHRL, see, for example, Frédéric Mégret, 'Nature of Obligations' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, OUP 2014) 101–04.

to apply throughout its territorial sea, as well as its internal and archipelagic waters. Consequently, in these maritime zones, the right to life, including any positive obligation to provide assistance to those in distress at sea, will apply.

The circumstances in which a State's human rights obligations apply extraterritorially may, however, be more difficult to identify with precision, relying, as they do, on a concept of jurisdiction unique to this context. The relevant criteria may be met in specific situations of *de jure* jurisdiction; of relevance here, it may arise as a consequence of the exclusive jurisdiction exercised by States over vessels flying their flag, in which case the flag State's full range of human rights obligations applies onboard its ships, wherever they are located.⁴⁹ As a result, a State's human rights obligations will apply with respect to individuals situated onboard a vessel in distress that is flagged to that State, as well as to individuals taken on board a rescuing ship flagged to the State.

Jurisdiction, such as to engage States' extraterritorial IHRL obligations, can also arise either through effective control of an area, or through the exercise by State agents of power and authority over an individual. The application of these principles in the maritime, generally, as well as in the course of MSOs, was discussed in Chapter Three. It will be recalled that the control exercised by States over extraterritorial maritime areas will only rarely amount to effective control. However, it was argued that many of the actions taken by State ships in the course of MSOs will amount to an exercise of power and authority, such as to give rise to the extraterritorial applicability of the human rights treaties under consideration.

Notwithstanding these general conclusions, applying the principles concerning extraterritorial applicability in the context of the provision of assistance to those in distress raises specific questions. In particular, does the role played by a State within its search and rescue area amount to effective control such that the State's IHRL obligations apply throughout that area? Alternatively, can the relationship between a State and a vessel in distress amount to one of authority and control, and, if so, when is this the case?

⁴⁹ Indeed, this was the situation in the case of the French-flagged ship in *Leray and Others v France* App No 44617/98 (ECtHR, 20 December 2001), discussed below, which found itself in difficulty off the coast of Spain.

Considering, first, the question of the control exercised by a State over its search and rescue area, it was explained in Chapter Three that extraterritorial application within a certain area depends on the State, as a matter of fact, exercising effective control over it.⁵⁰ This threshold, which has been applied, at least in connection with the European Convention on Human Rights (ECHR),⁵¹ as implying the ability of a State to discharge the full range of human rights obligations under a particular instrument, is especially difficult to reconcile with the freedoms afforded vessels in maritime areas seaward of a State's territorial waters. Although it was concluded that the exercise of effective control over areas of the sea cannot be excluded, such situations are likely to be confined to narrow circumstances, within tightly delimited areas.

Search and rescue areas are, however, necessarily vast; the Australian region, for example, covers nearly 53 million square kilometres, around a tenth of the Earth's surface.⁵² Beyond those zones in which a State may have rights and obligations as a coastal State, its responsibilities within its search and rescue region are limited only to search and rescue. Moreover, the responsibility of a State within its search and rescue region does not displace its obligations under UNCLOS, including, for example, its duty to respect the freedom of the high seas and the exclusive jurisdiction of a vessel's flag State. In light of these considerations, and no matter how diligently it discharges its search and rescue functions, it is not plausible that a State could exercise sufficient control over its search and rescue region, so as to amount to effective control, according to the meaning currently given to that term.

Turning to the question of authority and control over particular vessels in distress, a vessel in distress may be brought within the jurisdiction of a State through the control exercised by a vessel responding to the situation. In general, it is uncontroversial that ship operated by a State may exercise sufficient authority and control over the individuals situated in another vessel to bring them within that State's jurisdiction and therefore engage human rights

⁵⁰ See above s 3.3.3.

⁵¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

⁵² 'Australia's Search and Rescue Region' (*Australian Maritime Safety Authority*, 13 November 2017) <<https://www.amsa.gov.au/safety-navigation/search-and-rescue/australias-search-and-rescue-region>> accessed 5 July 2018.

obligations with respect to them.⁵³ Furthermore, it may do so even without its agents being physically present onboard the second vessel.⁵⁴ Indeed, in *JHA v Spain*, the Committee Against Torture considered a stricken vessel to be within the jurisdiction of the assisting State from the point it 'was rescued',⁵⁵ at which point it had been placed under tow by the assisting ship.

Whether and when individuals on board a stricken vessel come within the jurisdiction of an assisting State during the course of a rescue operation will, however, depend on the particular actions taken by the rescuing State. Consistent with the exercise of authority and control over ships in the course of MSOs more generally, certain acts undertaken by a rescuing ship in the course of rescue will almost certainly be sufficient, such as when it takes control of a vessel in distress by directing its course and speed, or by placing it under tow.⁵⁶ Clearly, however, these are actions taken once a rescue operation is in progress, and are of little relevance to the question whether a positive duty can exist to provide assistance, in the first place, to a ship located seaward of a State's territorial waters.

Applicability on even this basis will be complicated where the ship in question is a non-State vessel, rather than by a warship or other State-operated vessel.⁵⁷ This is because it must be established that the acts amounting to authority and control are, in fact, attributable to the State, as this is the very premise on which the required jurisdictional link between the State and the individual concerned is founded.⁵⁸ If, as is usually the case in the execution of MSOs, the ship

⁵³ See above s 3.3.4.

⁵⁴ As was the case, for example, during certain stages of *Medvedyev* and in *JHA v Spain*. See above s 3.3.4.

⁵⁵ UN Committee Against Torture, 'Decision of the Committee Against Torture under Article 22 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Concerning Communication No 323/2007' (Communication submitted by JHA on behalf of PK et al, concerning Spain) (21 November 2008) UN Doc CAT/C/41/D/323/2007 (*JHA v Spain*) para 8.2. For an outline of the facts, see above s 3.3.4.

⁵⁶ Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (CUP 2014) 466.

⁵⁷ The same issue arises with respect to the IHRL obligations of a State coordinating a rescue, where a ship that comes to the assistance of the vessel in distress is a warship or State-operated vessel of another State.

⁵⁸ Marko Milanovic, 'Jurisdiction, Attribution and Responsibility in *Jaloud*' (*EJIL Talk!*, 11 December 2014) <<https://www.ejiltalk.org/jurisdiction-attribution-and-responsibility-in-jaloud/>> accessed 5 July 2018.

executing the operation is a warship or other State-operated vessel, there is no doubt that its actions, as those of a *de jure* organ, will generally be attributable to the State.⁵⁹ On the other hand, where a privately-operated merchant vessel intervenes in a distress situation of its own accord, without any involvement of a State, its actions will not generally be attributable to a State,⁶⁰ and cannot therefore give rise to the extraterritorial application of human rights treaties on the basis of any authority and control it exercises over the rescued vessel.⁶¹ However, given the role a State may play in coordinating or directing a rescue operation, the question arises whether this may be sufficient such that the actions of merchant vessels involved in the rescue are, in fact, attributable to the State and are, as a result, potentially capable of amounting to State agent authority and control.

The actions of a merchant ship are likely to be attributable to a State where the ship acts 'on the instructions of, or under the direction or control of' that State.⁶² This might conceivably occur when a merchant vessel is directed to assist a vessel in distress; however, this will only be the case where the State directs or controls the specific rescue operation, and the acts in question are 'an integral part of that operation.'⁶³ Hence, if a State *directs* a particular merchant ship to

⁵⁹ ARSIWA (n 46) art 4.

⁶⁰ *ibid* commentary to ch 2, para 3.

⁶¹ Papastavridis (n 39) 29. Papastavridis suggests, however, that a vessel in distress would be within the jurisdiction of a (flag) State 'in the exceptional case that the flag State was informed by the master of the private vessel about the boat in distress, yet it instructed the master not to render assistance'. It is submitted, though, that this ignores the requirement for an act that amounts to authority and control over the vessel in distress. While the merchant ship might be acting on the instructions, or under the direction or control of the State in question, and its actions thus attributable to that State, it is difficult to see how the merchant ship could be said to be exercising authority and control over the vessel in distress.

⁶² ARSIWA (n 46) art 8. Although ARSIWA is concerned primarily with the responsibility of States for internationally wrongful acts, whereas the present issue is one of attribution more generally, it is submitted that ARSIWA provides an authoritative account of this area of the law. See ARSIWA Commentary to Chapter II para 4 ('As a normative operation, attribution must be clearly distinguished from the characterization of conduct as internationally wrongful. Its concern is to establish that there is an act of the State for the purposes of responsibility. To show that conduct is attributable to the State says nothing, as such, about the legality or otherwise of that conduct, and rules of attribution should not be formulated in terms which imply otherwise.').

⁶³ *ibid* commentary to art 8, para 3.

conduct a specific rescue operation, the actions of the merchant ship may be attributable to the State. However, where a State merely requests, for example, that any merchant ship close to a vessel in distress goes to its aid—as is more likely to be the case, given the general lack of authority on the part of States to direct ships on the high seas other than those flying their own flag—this is unlikely to amount to direction or control on the part of the State. Also insufficient would be a general requirement under a State's domestic law, in fulfilment of the State's obligation contained Article 98(1) UNCLOS, to require masters of vessels to go to the aid of vessels in distress.

In any case, beyond applicability of IHRL arising on the basis of the rescuing ship's actions, it has also been argued that, where the shore authorities of a State receive a distress call, this establishes a relationship giving rise to 'exclusive long distance de facto control' of the State over the vessel in distress.⁶⁴ Trevisanut argues that vessels in distress could, in this way, be brought within the jurisdiction of a State both within or outside a State's search and rescue area, although the argument in the latter situation is bolstered on account of the State's additional legal obligations under the SAR Convention. A similar, but slightly narrower, argument is made by Papastrivdis, to the effect that sufficient control will be exercised by a State over a vessel in distress where a distress call is

received *and acknowledged* by the Rescue Coordination Centre of the coastal State; in these cases, arguably, a form of long distance de facto control, between the State that received the call and the persons who sent it, may be established. Indeed, the life of the persons in distress depends on the conduct of the recipient State, which, being aware of the location of the vessel in distress and being aware of their situation, exerts certain control over these persons.⁶⁵

In considering these arguments, it should first be noted that the fact that the shore authorities will usually be located in the territory of the State concerned does not preclude finding that they exercise authority and control over individuals situated outside its territory. To illustrate the point, in *Smith (No 2)*, the United Kingdom Supreme Court concluded that government authorities located in the United Kingdom exercised authority and control over members of

⁶⁴ Trevisanut (n 23) 12–14.

⁶⁵ Papastavridis (n 39) 28 (emphasis added).

its armed forces deployed overseas, and that deployed personnel were therefore within the United Kingdom's jurisdiction for the purposes of the ECHR.⁶⁶ This decision also demonstrates that the extraterritorial applicability of IHRL can arise on the basis of State agent authority and control, notwithstanding substantial physical separation between the State agent and the individual in question. Although, it is submitted, distance may be a factor in considering whether a State agent is, in fact, exercising authority and control over an individual, it is not, in itself, determinative.

In principle, therefore, there is no inherent impediment to shore-based State authorities exercising authority and control over a vessel in distress. However, the argument that the receipt of a distress call, whether or not acknowledged, is sufficient to place a vessel in distress under the authority and control of the State in question would be a novel application of the law. This is particularly so given that authority and control in this context may, where it fails to take action to rescue a vessel in distress, depend on *inaction* on the part of the State. While it could be argued that, as a matter of principle, it would be perverse that a State taking action in an attempt to rescue a ship in distress would owe obligations under IHRL to the vessel in distress, whereas a State that deliberately chooses not to would not, authority and control has typically been established through positive acts on the part of the State agent. For example, the case of *Victor Saldano* concerned the alleged failure of Argentina to take action to protect the right to life with respect to its nationals sentenced to death in the United States.⁶⁷ Although the Inter-American Commission on Human Rights considered that 'a state party to the American Convention may be responsible under certain circumstances for the acts *and omissions* of its agents which produce effects or are undertaken outside that state's own territory',⁶⁸ mere inaction on the part of Argentina did not amount to an exercise of authority and control.⁶⁹

Moreover, the fact that the acts of a State are capable of violating a right does not necessarily mean that the test of authority and control is met, as to conclude

⁶⁶ *Smith (No. 2) v The Ministry of Defence* [2013] UKSC 41.

⁶⁷ *Victor Saldano v Argentina*, Petition, Report No 38/99, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.95 Doc 7 rev at 289 (1998) [2].

⁶⁸ *ibid* [17] (emphasis added)

⁶⁹ *ibid* [21]–[23].

otherwise would render the test meaningless. For example, the Grand Chamber in *Bankovic* explicitly rejected what it referred to as ‘a “cause-and-effect” notion of jurisdiction’, which ‘is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention.’⁷⁰ According to this position, the mere fact that a State may be in the position to protect the life of an individual, as may be the case where its authorities receive a call from a vessel in distress, does not, in itself, constitute the exercise of authority and control.

In light of these considerations, the argument that the receipt of a distress call, even if acknowledged, can be characterised as an exercise of authority and control, is not convincing. Therefore, although the contrary view of a court or treaty body cannot be ruled out, it is submitted that the extraterritorial applicability of a State’s IHRL obligations on this basis of its receipt of a distress call is not compatible with the current state of the law. More persuasive is the argument that a State might exercise authority and control over a vessel in distress, through its shore authorities, once action is taken to mount a rescue, or a plan has at least been formulated to do so. In that situation, the vessel in distress could more convincingly be argued to be under the control of the rescuing State, particularly where it acts under instruction as part of, and in reliance on, the plan. Nevertheless, applicability arising on this basis would still represent a novel application of the law, and is speculative at best.

To summarise, where a vessel in distress is located in a State’s territorial sea, or internal or archipelagic waters, IHRL treaty obligations, including positive obligations arising under the right to life, will apply. Extraterritorially, a State’s IHRL treaty obligations will apply onboard its own flagged vessels, including when such vessels are in distress, wherever they are located. In addition, where a vessel in distress is located in an area outside any State’s territorial waters, but over which a State exercises effective control, that State’s IHRL obligations

⁷⁰ *Banković and Others v Belgium and Others* ECHR 2001–XII 333 [75]. Although, as discussed in ch 3, doubt has been cast on some aspects of *Bankovic*, there is no reason to doubt the continued authority of this statement. See also *Al-Saadoon and Others v Secretary of State for Defence* [2015] EWHC 715 (Admin) [104]–[105].

will apply. Importantly, however, as the law stands, this will not be the case with respect to a State's entire search and rescue area. Finally, where a State, through its agents, exercises authority and control over the individuals on board a vessel in distress, that State's IHRL obligations will apply to its activities concerning those individuals. This will almost certainly be the case where a warship, other State-operated ship, or private vessel acting on the specific instructions of a State, directly controls the vessel in distress, such as by placing it under tow or directing its navigation. On the other hand, it is unlikely to be established through the mere receipt of a distress call, and applicability arising from the coordination of a rescue by a State's shore authorities is speculative, though more plausible. Considering, specifically, the applicability of IHRL to a vessel in distress that is yet to be rescued, and over which a State is therefore unlikely yet to be exercising authority and control, the only States whose positive obligations under the right to life are likely to be engaged are the flag State (if any), as well as the coastal State if the vessel is located in its territorial waters, or, exceptionally, waters over which it exercises effective control.

6.3.2. Duties relating to the provision of assistance to those in distress under the right to life

The right to life has long been understood to entail positive obligations on the part of the State. With respect to the International Covenant on Civil and Political Rights (ICCPR),⁷¹ the Human Rights Committee (HRC) observed in 1982 that 'the right to life has been too often narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures.'⁷² Draft General Comment 36 states that 'States parties are thus under a due diligence obligation to undertake reasonable positive measures, which do not impose on them impossible or disproportionate burdens, in

⁷¹ International Covenant on Civil and Political Rights, Ratification Instrument of the United States of America (deposited 8 June 1992, with effect from 8 September 1992) 1676 UNTS 543.

⁷² UN Human Rights Committee, 'General Comment No 6' (30 April 1982) UN Doc HRI/GEN/1/Rev.1, 6 (HRC General Comment 6) para 5.

response to foreseeable threats to life originating from private persons and entities, whose conduct is not attributable to the State.’⁷³

With respect to the ECHR, the European Court of Human Rights (ECtHR) has recognised a positive duty on States to take ‘appropriate steps to safeguard the lives of those within their jurisdiction’.⁷⁴ Indeed, the Grand Chamber has held that the positive obligation arising from the right to life ‘must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake’.⁷⁵ Likewise, the Inter-American Court of Human Rights (IACtHR), interpreting Article 4 of the American Convention on Human Rights (ACHR),⁷⁶ requires States ‘to take reasonable steps to prevent human rights violations’,⁷⁷ and has required positive steps on the part of States specifically in connection with the right to life.⁷⁸ Similarly, in its General Comment 3, the African Commission interprets the right to life under the African Charter on Human and Peoples’ Rights (ACHPR)⁷⁹ as imposing

a positive duty to protect individuals and groups from real and immediate risks to their lives caused either by actions or inactions of third parties. In cases where the risk has not arisen from malicious or other intent then the State’s actions may not always be related to criminal justice. Such actions include, inter alia, preventive steps to preserve and protect the natural environment and humanitarian responses to natural disasters, famines, outbreaks of infectious diseases, or other emergencies.⁸⁰

⁷³ UN Human Rights Committee, ‘General Comment No 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life’ (Revised draft prepared by the Rapporteur) <https://ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf> accessed 5 July 2018 para 25.

⁷⁴ *LCB v the United Kingdom* ECHR 1998-III [36]. See also the cases cited at William A Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 126 fn 77.

⁷⁵ *Öneryıldız v Turkey* ECHR 2004-XII 79 [71].

⁷⁶ American Convention on Human Rights: ‘Pact of San José, Costa Rica’ (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 144 art 4.

⁷⁷ *Velásquez Rodríguez v Honduras* (Merits) Inter-American Court of Human Rights Series C No 4 (29 July 1988) [174].

⁷⁸ Thomas M Antkowiak and Alejandra Gonza, *The American Convention on Human Rights: Essential Rights* (OUP 2017) 65–66.

⁷⁹ African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58.

⁸⁰ African Commission on Human and Peoples’ Rights, *General Comment No 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article*

Notwithstanding these general conclusions, there is relatively little jurisprudence dealing specifically with the provision of assistance to those in distress at sea. Nevertheless, the extension of States' positive obligations under the right to life to such situations has been recognised by the ECtHR. The case of *Leray and others v France* concerned a French-flagged merchant vessel that sank off the coast of Spain in 1979, leading to the loss of twenty-three lives.⁸¹ The case was brought by relatives of the victims, alleging in part that the French authorities had committed a series of serious mistakes in responding to distress signals sent by the stricken vessel. These allegations had been subject to extensive litigation in the French courts, with no fault found. As a result, this part of the case was declared manifestly ill-founded. Nevertheless, the Court proceeded on the basis that the provision of rescue services to vessels in distress was within the scope of Article 2 ECHR. Furthermore, as noted above, the case concerned the obligations owed by a flag State to its vessel situated outside its territory.

The later case of *Furdik v Slovakia* concerned, on its own facts, the adequacy of mountain rescue services provided to an injured climber following an incident in the High Tatra mountains in 2005. However, although the facts on which the decision was based concerned the provision of emergency services on land, the Court's reasoning contains a number of important principles concerning the provision of emergency services, generally, that are applicable equally to the maritime domain. Indeed, the Court in *Furdik* referred directly to the provision of 'air-sea rescue facilities to assist those in distress' as an example of such emergency services.⁸² Having considered the relevant jurisprudence, the Court stated that:

the State's duty to safeguard the right to life must also be considered to extend to the provision of emergency services where it has been brought to the notice of the authorities that the life or health of an individual is at risk on account of injuries sustained as a result of an accident. Depending on the circumstances, this duty may go beyond the provision of essential emergency services such as fire-brigades and ambulances and, of

4) (adopted during the 57th Ordinary Session in Banjul, Gambia, 4–18 November 2015) para 41.

⁸¹ *Leray* (n 49).

⁸² *Milan Furdik v Slovakia* (Admissibility) App no 42994/05 (ECtHR, 2 December 2008). The decision is not paginated.

relevance to the instant case, include the provision of air-mountain or air-sea rescue facilities to assist those in distress.⁸³

From this, requirements can be identified both to make provision for emergency services and to deploy them in response to particular situations of which a State has been made aware. It is submitted that, although the Court refers specifically to 'air-sea' rescue, it would make no sense for the scope of emergency services that must be provided not to extend to the provision of assistance by sea.

Notwithstanding, however, the obligation to provide emergency services, the Court in *Furdik* went on to state that

the positive obligation is to be interpreted in a way as not to impose an excessive burden on the authorities, bearing in mind, in particular, the unpredictability of human conduct and operational choices which must be made in terms of priorities and resources. The Court recalls in this connection that the choice of means for ensuring the positive obligations under Article 2 is in principle a matter that falls within the Contracting State's margin of appreciation. There are different avenues to ensure Convention rights, and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means.⁸⁴

From this passage, two important caveats to the general obligation to provide emergency services can be identified. First, the obligation is limited to the provision of only that which is not excessive with respect to the burden it places on authorities. Given the subsequent reference to resources, the 'burden' in question presumably refers at least in part to the financial cost of providing the services in question, both in terms of the general provision of rescue services, and with respect to a particular rescue operation. Second, a State is to be afforded a margin of appreciation in deciding how to meet its positive obligations under the right to life, and thus in the provision of rescue services. This applies, in particular, to decisions as to the deployment of resources to meet competing requirements, as well as to decisions as to how to use those resources in order to fulfil its positive obligations.

Both principles are relevant to the provision of assistance to those in distress at sea, noting, in particular, the potential cost of rescuing vessels in remote locations, such as may be the case with respect to a State's flagged vessels,

⁸³ *ibid.*

⁸⁴ *ibid* (citations omitted).

which may be located anywhere in the world. Given the relevance of the burden placed on the State, and the margin of appreciation it is afforded, it might justifiably rely on such grounds to differentiate the assistance provided to remote vessels, as compared to those located close to its coast, where the cost of rescue is likely to be lower. By this logic, it is likely to be justifiable for a State to establish a coast guard service only close to its coast, while meeting its positive obligations to its remote flagged vessels through agreements made for the provision of mutual assistance, including, in particular, the system established under the SAR convention.

Furthermore, the simple fact that an option might exist to mount a rescue does not necessarily imply that the State is obliged to conduct the operation, if the cost would be excessive given the priority of the operation relative to other demands on resources. To give a concrete, hypothetical, example, a situation may arise where assistance could be provided to a vessel in distress either by air or by sea, with the former being more expensive than the latter, but with a higher chance of averting a threat to the lives of the individuals being rescued. In these circumstances, the State would still be justified in choosing the cheaper option, either if rescue by air would be excessive in its cost relative to the resources of the State concerned, or if the decision is justified as an allocation of resources between competing priorities, within the State's margin of appreciation.

To give another hypothetical example, a vessel in distress may be located off a State's coast (within its territorial sea, for the sake of argument) when it finds itself in difficulty and in need of assistance within a certain timeframe to avert a threat to the life of individuals onboard. If there is no rescue vessel situated sufficiently close to intervene in time, the State concerned will not necessarily have failed to meet its obligations by failing to provide a rescue vessel within close enough range to have been of assistance. Not only may the provision of more rescue vessels, such as to reduce the distance between them, have been excessive relative to the resources of the State concerned, but the decision where to locate vessels, in order to meet operational priorities, is likely to be within the State's margin of appreciation.

As well as the actual provision of emergency services, it is clear from *Furdik* that the positive obligation entails the 'setting up of an appropriate regulatory framework for rescuing persons in distress and ensuring the effective functioning of such a framework'.⁸⁵ This extends to the establishment of domestic mechanisms for addressing situations where the response to a situation of distress is alleged to have been inadequate. The Court in *Furdik* stated that, 'The State's positive obligation also requires an effective independent judicial system to be set up so that an alleged deficient response to an emergency resulting in the death of the person in distress can be the subject of scrutiny and, as appropriate, those found to be responsible held accountable for their acts or omissions.'⁸⁶ The Court explained that this does not necessarily mean that criminal consequences must flow from a failure, rather that an appropriate remedy should be provided for.⁸⁷

The application of these principles to the facts of the case in *Furdik* is illustrative of how they operate in practice. In issue in *Furdik* was the specific allegation that Slovakia's positive obligation under the right to life had been breached through the absence in its regulatory framework of a specific time limit for the provision of an air ambulance, referring only to the provision of 'indispensable medical assistance without delay'.⁸⁸ Having examined the Slovakian regulatory framework, the Court could see 'no reason for putting in doubt the adequacy of the mechanisms in place as a whole', notwithstanding that regulations dealing specifically with the response times of air ambulances had been planned for but not yet created.⁸⁹ The Court '[did] not consider that the positive obligations under Article 2 stretch as far as to require the incorporation in the relevant regulations of an obligation of result, that is a time-limit within which an aerial ambulance must reach a person needing urgent medical assistance, as suggested by the applicant.'⁹⁰ The Court further explained that the dependence of airborne assistance on weather, terrain and technical constraints 'would render such a general obligation difficult to fulfil and impose a disproportionate

⁸⁵ *ibid.*

⁸⁶ *ibid.*

⁸⁷ It may be, for example, that an acknowledgment of failure and/or an apology would be sufficient.

⁸⁸ *Furdik* (n 82).

⁸⁹ *ibid.*

⁹⁰ *ibid.*

burden on the authorities of Contracting States'.⁹¹ This point has clear application by analogy to the maritime domain, in which the provision of rescue services will be similarly dependent on environmental, operational and technical factors, particularly in the case of rescues effected at significant distance from the State in question.

The ECtHR's decisions in *Furdik* and *Leray* provide support for the contention that States' positive obligations under Article 2 ECHR can encompass the provision of assistance to those in distress at sea, as well as providing, in *Furdik*, a reference point as to how they apply in practice. Moreover, the practice of the ECtHR, although of direct relevance only to the ECHR, is consistent with the broader principles set out above concerning the duty to protect recognized under each of the other systems. It provides, therefore, support for the proposition that the right to life under each of the instruments under consideration entails positive obligations relating to the provision of assistance to those in distress at sea. Even so, predicting how those obligations will be applied in practice is unavoidably speculative, given the limited case law dealing directly with the subject.

Nevertheless, it is submitted that principles that can be identified from *Furdik*, emphasizing, in particular, the flexibility afforded to States in the provision of rescue services to meet their positive obligation under the right to life, are of relevance not only to the Article 2 ECHR, but more widely to the other instruments under consideration. In determining whether a State has met its obligations, a court or other supervising body will be concerned primarily with the structures put in place by the State for the provision of rescue services, including systems for investigation and accountability when things go wrong, rather than the conduct of a particular rescue operation. If the structures implemented by a State are within its margin of appreciation, and the associated policies and procedures have been followed in a particular case, then the State is unlikely to be found in breach of its positive obligations under the right to life. From the opposite perspective, a successful claimant would have to show that the system for the provision of rescue services was so flawed in its structure or implementation that it fell outside the considerable latitude granted to States, taking into account both the resources and priorities of that

⁹¹ *ibid.*

particular State. Absent evidence of a blatant failure on the part of the State to provide assistance to particular individuals in distress when it was clearly reasonable to do so, it is submitted that this presents a substantial obstacle to a successful claim in practice.

6.4. Conclusion

From the above analysis, it is clear that States may, in some circumstances, have a duty to assist those in distress both under the law of the sea and under IHRL. While there is overlap between the two, there are also important differences in their scope and content. First, with respect to the applicability, the law of the sea contains obligations that apply in two distinct areas. The duty to render assistance, reflected in UNCLOS Article 98(1), applies in the vicinity of vessels flying the State's flag. In contrast, the duty of coastal States to establish search and rescue services, contained in UNCLOS Article 98(2) and expanded upon in the SAR Convention, is not geographically constrained, though with particular obligations incurred by States within their own search and rescue regions. On the other hand, the IHRL obligation to provide assistance to those in distress arises in a number of different set of situations. It applies, on account of the territorial applicability of the treaties in question, in the State's internal and archipelagic waters and territorial sea. It may also apply extraterritorially, according to the same criteria discussed in other contexts; this is most likely to be the case with respect to a State's flagged vessels, and where a vessel whose actions are attributable to the State exercises authority and control over a vessel in distress, wherever it might be located. According to the current state of the law, the arguments that IHRL obligations can apply throughout a State's search and rescue area, or on the basis of a distress call, acknowledged or not, are unconvincing. More plausible, though still speculative, is the argument that a State's shore authorities might exercise authority and control over a vessel when they take action in response to a distress call.

Second, turning to the content of the obligations under the law of the sea and under human rights law, there is significant overlap. To the extent that a vessel in distress falls within the jurisdiction of a State while in the vicinity of that State's vessels, IHRL clearly includes an obligation on the State to render assistance to the extent reasonable. Furthermore, the duty owed under the law

of the sea to establish search and rescue services is closely analogous to the obligation owed under human rights law and applied in *Furdik*. Both are obligations of conduct rather than result, requiring the creation, maintenance and enforcement of a system for the provision of rescue services. Indeed, it is likely that a Court examining the compliance of a State with the human rights obligation would look to the law of the sea in assessing whether the appropriate standard had been met. In any case the human rights obligation does not appear to go much further than that owed under the law of the sea.

Finally, however, although the substance of the obligations may be broadly similar, there is a significant difference in their enforceability by individuals. The law of the sea obligation is owed strictly between States and it is therefore only through the State of nationality that an individual may seek recourse for a failure on the part of another State to provide assistance. The IHRL obligation, on the other hand, is a duty owed to the individual and, where appropriate mechanisms exist, may be subject to individual complaint. This, arguably, is the most important consequence of finding an obligation to assist vessels in distress under human rights law.

7. *Non-Refoulement*

7.1. Introduction

Non-refoulement, or the prohibition of the expulsion, return or extradition of individuals to another State where there is a risk that their rights will be violated, is a principle of fundamental importance in human rights law. It is perhaps surprising that such an important concept is not set out in express terms in either the International Covenant for Civil and Political Rights (ICCPR),¹ European Convention on Human Rights (ECHR)² or African Charter on Human and Peoples' Rights (ACHPR),³ instead, as explained below, being inferred from the broader responsibilities to respect and protect the rights to which individuals are entitled. Of the human rights instruments under consideration, only the American Convention on Human Rights (ACHR)⁴ and Convention Against Torture (CAT)⁵ contain express *non-refoulement* provisions, which, as set out below, are limited in their application to specific, relatively narrow, circumstances. Nevertheless, international human rights law (IHRL) has developed detailed doctrine relating to the principle of *non-refoulement* and the principle has been applied in the context of a relatively broad range of substantive rights.

The prohibition of *refoulement* is often considered in a specific context, rather than as a unitary concept in itself. In the maritime, it has arisen frequently in discussions relating to the expulsion or return of irregular migrants intercepted at sea.⁶ However, it may apply also to the transfer of suspected criminals to

¹ International Covenant on Civil and Political Rights, Ratification Instrument of the United States of America (deposited 8 June 1992, with effect from 8 September 1992) 1676 UNTS 543 (ICCPR).

² Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

³ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (ACHPR).

⁴ American Convention on Human Rights: 'Pact of San José, Costa Rica' (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 144 (ACHR).

⁵ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 113 (CAT).

⁶ See, for example, Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (CUP 2014) 160–63, 175–79; Efthymios Papastavridis,

another State for prosecution, for example in the case of individuals suspected of piracy.⁷ Indeed, it is potentially relevant whenever a State expels, returns or extradites an individual to another State. As will be discussed below, its applicability beyond the territory of the State concerned depends on the broader question of the extraterritorial application of the instruments in question, and potentially of the specific rights implicated by the particular situation at hand.⁸

This chapter begins by briefly examining the principle of *non-refoulement*, or analogous principles, as they exist, first, in the law of the sea and, second, in refugee law. This short discussion will provide context for the subsequent examination of *non-refoulement* under IHRL, in particular by identifying the weaknesses and deficiencies that exist in protection elsewhere. The chapter will then proceed to outline the principle of *non-refoulement* in IHRL, noting that the depth and breadth of the law and practice relating to *non-refoulement*, generally, precludes a comprehensive survey within the confines of this chapter. The subsequent analysis will then focus on particular issues arising from the application of the principle of *non-refoulement* under IHRL to maritime security operations (MSOs), dealing, first, with its applicability, and, second, with its implementation in practice.

It should be noted at the outset that a variety of language is used in connection with the *non-refoulement* obligation. Different instruments refer to ‘expulsion’, ‘return’ and ‘extradition’, alongside the term ‘*refoulement*’ itself. Except where a distinction is deliberately to be made, *refoulement* (and *non-refoulement*) will be used to refer to the concept as a whole.

Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans (Hart 2013) 302-08.

⁷ See, for example, Anna Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (Brill Nijhoff 2014) 315–412.

⁸ On extraterritorial application generally, see above ch 3.

7.2. *Non-refoulement* and analogous principles elsewhere in international law

7.2.1. *Law of the sea*

The law of the sea contains no specific prohibition of *refoulement*.⁹ However, as discussed in Chapter Six, individuals who have been rescued must be taken to a 'place of safety'.¹⁰ Gallagher and David suggest that the concept of a place of safety 'is increasingly understood as encompassing protection from *refoulement*.'¹¹ Of the evidence they cite, most convincing is a Council of Europe definition of a place of safety as requiring that individuals' fundamental rights be protected.¹² According to such a definition, it would hardly be conceivable that a place of safety could include a place to which transfer would be prohibited on the basis of *non-refoulement* and, to that extent, Gallagher and David's assertion seems, to a certain extent, justified.

Nevertheless, the requirement to take a rescued individual to a place of safety should not simply be equated with the principle of *non-refoulement*. The former is a *positive* obligation on the part of rescuing States to find a suitable location to which rescued individuals may be taken. While the suitability of a place of safety may be gauged with respect to human rights norms, the nature of the obligation is fundamentally different to that of *non-refoulement*, which is primarily a *negative* obligation not to expel, return or extradite individuals to particular territories. Conversely, the principle of *non-refoulement* carries with it

⁹ It has been suggested, in the context of individuals detained on suspicion of piracy, that only the detaining State is competent under the terms of the United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS) to prosecute them and that their transfer to another State for prosecution is therefore prohibited. However, as Petrig persuasively argues, such arguments are flawed on several grounds, not least the established universality of jurisdiction to try piracy suspects. Petrig (n 7) 316–19.

¹⁰ See above s 6.2.

¹¹ Gallagher and David (n 6) 480. See also Virginia Passalacqua, 'The "Open Arms" Case: Reconciling the Notion of "Place of Safety" with the Human Rights of Migrants' (*EJIL Talk!*, 21 May 2018) <<https://www.ejiltalk.org/the-open-arms-case-reconciling-the-notion-of-place-of-safety-with-the-human-rights-of-migrants/>> accessed 5 July 2018.

¹² Parliamentary Assembly of the Council of Europe, Resolution 1821 'The Interception and Rescue at Sea of Asylum Seekers, Refugees and Irregular Migrants' (2011) para 9.5.

significant procedural obligations, as will be discussed below, whereas the place of safety requirement is ultimately an obligation of result.

Whatever the contours of the place of safety requirement, it is of only limited application, specifically to those rescued at sea. In this sense, it is of much narrower application than the principle of *non-refoulement*, which concerns expulsion, return or extradition for any reason. Therefore, while the requirement to take an individual to a place of safety may be relevant, for example, where migrants are rescued while attempting to reach a coastal State, it is of no general application to those detained, or who otherwise fall under the control of a State, in other circumstances.

7.2.2. Refugee law

Non-refoulement is arguably the cornerstone of modern refugee law.¹³ Indeed, inherent in the concept of asylum is protection from *refoulement* to a State where a refugee has a well-founded fear of persecution. Article 33 of the 1951 Refugee Convention,¹⁴ which is widely considered to reflect customary international law,¹⁵ sets out the *non-refoulement* obligation as follows:

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

¹³ See, generally, Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 201–84; Gallagher and David (n 6) 160–63.

¹⁴ Convention Relating to the Status of Refugees (concluded 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 as amended by the Protocol Relating to the Status of Refugees (concluded 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

¹⁵ See, for example, UN High Commissioner for Refugees, ‘Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol’ (26 January 2007) (UNHCR advisory opinion on the extraterritorial application of *non-refoulement*) paras 14–16.

However, the text of Article 33 reveals two important limitations to the principle of *non-refoulement* as manifested in the Refugee Convention. First, it applies only to refugees as defined under the Refugee Convention, usually referring only to those who,

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹⁶

While a formal assessment of refugee status is not necessarily required,¹⁷ protection from *non-refoulement* under the Refugee Convention is limited to those with a credible fear of persecution on particular grounds. The concept of persecution is not defined precisely and can be interpreted broadly to include not only ‘the threat of deprivation of life or physical freedom’, but to other ‘less overt’, albeit discriminatory, policies.¹⁸ Although the language of Article 33(1) might suggest that the protection from *refoulement* is further restricted to situations only where there is a threat to life or freedom, it has been interpreted in practice to apply to all those who qualify as a refugee.¹⁹

Nevertheless, the requirement of discriminatory grounds significantly limits the availability of refugee status and, as a result, protection from *refoulement* under the Refugee Convention. While the State’s grounds can be interpreted broadly, particularly with respect to the category of ‘social group’, the measures taken by the State must be discriminatory in order to amount to persecution. Hence there is no refugee status, and no protection from *refoulement*, for those who fear mistreatment on an individual or non-discriminatory basis. For example, deficiencies in the criminal justice system, such as the right to a fair trial or exposure to cruel or inhuman punishment, would not, in and of themselves, give rise to refugee status so long as they are not discriminatory. In the maritime

¹⁶ Convention Relating to the Status of Refugees (concluded 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 as amended by the Protocol Relating to the Status of Refugees (concluded 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 art 1A(2).

¹⁷ Goodwin-Gill and McAdam (n 13) 232–33.

¹⁸ Ibid 90–92.

¹⁹ Ibid 233–34.

context this means that many potentially relevant situations, such as the transfer of individuals suspected of piracy, may fall outside the protection of Article 33.²⁰ As will be discussed below, protection from *refoulement* under IHRL is potentially broader.

The second notable limitation arises from the exclusions contained in Article 33(2) relating to threats to national security and public safety. If these criteria for exclusion are met, then the plain meaning of Article 33(2) is to permit *refoulement* no matter what the consequences for the individual. It has been argued that a decision to deny the protection of Article 33 is, or should be, subject to a proportionality assessment, in which the grounds for exclusion are weighed against the harm expected to be caused.²¹ Even if this is the case, the point remains that *refoulement* that would otherwise be prohibited may be permitted where the threat to national security or public safety is sufficiently high. Importantly, these exclusions do not apply to the protection against *refoulement* under IHRL.²²

In addition to these two limitations, another issue arises with respect to the spatial applicability of Article 33, which has proved at least as controversial as the applicability of IHRL treaties,²³ discussed in Chapters Two and Three. Article 33 is not made subject to any express provision concerning its spatial scope of applicability; as a result, debate has focused on whether the language of Article 33, particularly the words ‘expel’, ‘return’ and ‘*refouler*’, should be interpreted as applying outside a State’s territory, as well as within. A detailed analysis is beyond the scope of this thesis; however, continued doubt as to the extraterritorial applicability of the *non-refoulement* norm in refugee law provides a further reason why alternative protection from *refoulement*, under IHRL, may be of particular interest and importance. For that reason, a brief summary of the debate is presented here.

The argument for a narrow application of Article 33, limited to the territory of States parties, is best illustrated by the position of the United States Supreme

²⁰ Petrig (n 7) 323.

²¹ Goodwin-Gill and McAdam (n 13) 240–41.

²² See, in the context of Article 3 CAT, Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (OUP 2008) 195, 197–98.

²³ See, for example, Gallagher and David (n 6) 264–72

Court in *Sale, Acting Commissioner, INS v Haitian Centers Council*,²⁴ which concerned the United States' policy in the early 1990s of intercepting on the high seas irregular migrants attempting to reach the United States from Haiti, and returning them without determination of refugee status. In *Sale* the US Supreme Court considered whether this practice was prohibited under either Article 33 or relevant US domestic law, finding in the negative with respect to both. On the international law question, the Court's examination of Article 33 focused on two points in particular. First, the Court found that accepting extraterritorial application of Article 33 would lead to 'an absurd anomaly', in that an individual presenting a danger to security could be denied protection from *refoulement* under Article 33(2) when present in a State's territory, but not when on the high seas.²⁵ Second, the Court considered that the specific use of the term '*refouler*' implied a narrower legal definition ought to be given to the word 'return' in Article 33(1). Specifically, the Court concluded that 'return' in this context referred to an individual present within a territory but not yet resident there (as distinct from 'expel', which would apply to an individual admitted to a territory).²⁶ These points, alongside a brief examination of the *travaux*, led the Court ultimately to conclude that Article 33 applied only within the territory of a State, and not, therefore, on the high seas.²⁷

The Supreme Court's judgment in *Sale* has been criticised as being motivated by political considerations and lacking in the quality of its analysis of the international law issues involved.²⁸ Furthermore, when the case was subsequently considered by the Inter-American Commission on Human Rights, the Commission reached a different conclusion, agreeing with the views submitted to the Supreme Court by the UN High Commissioner for Refugees (UNHCR) in an *amicus curae* brief 'that Article 33 had no geographical

²⁴ *Sale v Haitian Centers Council* 509 US 155 (1993).

²⁵ *ibid* 179–80.

²⁶ *ibid* 180–82.

²⁷ *ibid* 187 ('The negotiating history, which suggests that the Convention's limited reach resulted from a deliberate bargain, is not dispositive, but it solidly supports our reluctance to interpret Article 33 to impose obligations on the contracting parties that are broader than the text commands. We do not read that text to apply to aliens interdicted on the high seas.').

²⁸ The debate is summarised in Gallagher and David (n 6) 269–72; see also Goodwin-Gill and McAdam (n 13) 247.

limitations.²⁹ UNHCR had argued that the language of Article 33 is 'broad and unequivocal', in prohibiting 'both the expulsion of a refugee *from* a contracting State and, of critical importance here, the return of a refugee *to* a territory where his or her life or freedom would be endangered.'³⁰ The latter prohibition, UNHCR argued, was not subject to any geographical limitation, pointing in support to: the structure of the treaty, which expressly limits other provisions to States' territory; the Refugee Convention's 'broad and overriding humanitarian purpose'; the United States' prior practice; and the negotiating history of the treaty.³¹

UNHCR subsequently reaffirmed its position on the extraterritorial applicability of Article 33 in a 2007 Advisory Opinion.³² Academic support is also strongly on the side of the UNHCR position but, as Gallagher and David note, 'Despite its scholarly strength and persuasive logic, this consensus view among commentators and UNHCR is worryingly one-sided, and consequentially fragile.'³³ Indeed, as they point out, the position of the US Supreme Court has also been adopted in domestic decisions in the United Kingdom³⁴ and Australia.³⁵ Although such practice clearly cannot be determinative of the issue, it is a fair conclusion that, 'What is clear is the lack of strong evidence for State consent to an understanding of the obligation of *non-refoulement* that extends to asylum-seekers who are not at the borders or physically within the territory of the State.'³⁶

In conclusion, Article 33 of the Refugee Convention may be relevant to an important category of individuals that States might encounter in the course of conducting MSOs. However, extraterritorial applicability issues aside, it applies

²⁹ *The Haitian Centre for Human Rights et al v United States*, Case 10.675, Report No 51/96, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.95 Doc 7 rev at 550 (1997) [157].

³⁰ Reproduced at Office of the United Nations High Commissioner for Refugees, 'The Haitian Interdiction Case 1993 Brief *Amicus Curiae*' (1994) 6(1) Intl J of Refugee L 85 (UNHCR *amicus* brief), 87.

³¹ The argument is summarised at *ibid* 86–87.

³² UNHCR advisory opinion on the extraterritorial application of *non-refoulement* (n 15) paras 23–43.

³³ Gallagher and David (n 6) 271.

³⁴ *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55.

³⁵ *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225.

³⁶ Gallagher and David (n 6) 271.

only to those who qualify as refugees and is not absolute in light of the security exception. As explained below, the prohibition on *refoulement* under IHRL is significantly broader in that it does not rely on refugee status, and is not generally subject to the same caveat where individuals present a threat to security. Furthermore, although extraterritorial applicability is often a contentious issue within IHRL, the separate and continuing controversy as to the applicability of Article 33 beyond a State's territory means that the existence of equivalent (or greater) protection under IHRL might be especially pertinent.

7.3. *Non-refoulement* in IHRL

7.3.1. *The prohibition on refoulement*

Each of the human rights treaties under consideration prohibits *refoulement* in various circumstances, either by virtue of express provision, or as arising implicitly in connection with various substantive rights. Express provisions are contained in both the CAT and the ACHR. Article 3 CAT states that:

1. No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger being subjected to torture.
2. For the purposes of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Although, as discussed below, the principle of *non-refoulement* applies to a wide, potentially open-ended, set of rights under the other treaties under consideration, Article 3 CAT has been interpreted by the Committee Against Torture as applying only to torture in the strict sense, as defined in Article 1 CAT.³⁷ The *travaux* show that consideration was given during the drafting process to the extension of the *non-refoulement* provision to other cruel, inhuman or degrading treatment or punishment, but that this was ultimately rejected by the majority.³⁸ Against this backdrop, it is unsurprising that the

³⁷ Nowak and McArthur (n 22) para 183.

³⁸ *ibid* para 182.

Committee has declined to infer a broader principle of *non-refoulement* from other CAT provisions, particularly Article 16.³⁹

Article 22(8) ACHR makes express provision for *non-refoulement* in some circumstances, stating that:

In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.

Protection under Article 22(8) is limited to an individual's 'right to life or personal freedom', and then only where the threat to those rights arises because of one of the specified reasons. As a result, although broader than Article 33 of the Refugee Convention, in that it does not require the individual in question to meet the definition of a refugee,⁴⁰ it is considerably narrower than the principle as it has been identified as arising implicitly, discussed next.

Beyond these express provisions, the principle of *non-refoulement* has been identified as arising implicitly under the ICCPR, ECHR, ACHR and ACHPR. In general terms, the Human Rights Committee (HRC) stated in General Comment 31 that:

Moreover, the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.⁴¹

Notable here is that the HRC refers, by way of example, to Article 6 ICCPR (right to life) and Article 7 ICCPR (prohibition of torture and cruel, inhuman or degrading treatment or punishment), but does not limit the *non-refoulement*

³⁹ *ibid* para 183.

⁴⁰ *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* (Advisory Opinion OC-21/14) Inter-American Court of Human Rights Series A No 21 (19 August 2014) (*Advisory Opinion on the Rights and Guarantees of Children*) para 217.

⁴¹ UN Human Rights Committee, 'General Comment No 31' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add. 13 (HRC General Comment 31), para 12.

principle to these rights alone, but rather to situations where there is a risk of 'irreparable harm'.⁴²

With respect to the ECHR, the European Court of Human Rights (ECtHR) has stated that a State party's 'responsibility may...be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction.'⁴³ However, although this passage implies that the principle of *non-refoulement* under the ECHR is not limited to particular rights, the practice noted below demonstrates that it will not necessarily act to prohibit *refoulement* wherever there is a risk that *any* right will be violated to *any* degree. This, it is submitted, can be compared with the requirement of 'irreparable harm' under the ICCPR.

The principle is arguably applied most consistently in connection with the risk of torture or cruel, inhuman or degrading treatment or punishment.⁴⁴ With respect to the ICCPR, the HRC stated in General Comment 20 that 'In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.'⁴⁵ Similarly, the ECtHR has stated that the responsibility of a State Party is engaged 'where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.'⁴⁶ Likewise, the Inter-American Court of Human Rights (IACtHR) has held that

Article 5 of the American Convention, read together with the obligations erga omnes to respect and ensure respect for the norms that protect human rights, reveals the obligation of the State not to deport, return, expel, extradite, or remove in any other way to another State a person who is subject to its jurisdiction, or to a third State that is unsafe, when

⁴² *ibid* para 12.

⁴³ *Ilasçu and Others v Moldova and Russia* ECHR 2004-VII 179 [317]. See also William A Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 95–96.

⁴⁴ For discussion relating to the ECHR and ICCPR, see Petrig (n 7) 334–48

⁴⁵ UN Human Rights Committee, 'General Comment No 20' (10 March 1992) UN Doc HRI/GEN/1/Rev.1, 30 para 9.

⁴⁶ *Soering v the United Kingdom* Series A no 161 (ECtHR) [91].

there are grounds for believing that they would be in danger of being subjected to torture, or cruel, inhuman or degrading treatment.⁴⁷

With respect to the ACHPR, although practice is more limited, the African Commission has stated in its *Guidelines and Measures for the Prohibition of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa* that, 'States should ensure no one is expelled or extradited to a country where he or she is at risk of being subjected to torture.'⁴⁸

The prohibition of *refoulement* has also been applied in connection with other rights, although practice differs between instruments. For example, the HRC, IACtHR and ACHPR have also applied the principle in connection with the right to life.⁴⁹ In particular, both the IACtHR and ACHPR have specifically identified it as being applicable with respect to *refoulement* by States that have abolished the death penalty to those that have retained it.⁵⁰ With respect to the ECHR,⁵¹

⁴⁷ *Advisory Opinion on the Rights and Guarantees of Children* (n 40) para 226.

⁴⁸ African Commission on Human and Peoples' Rights, 'Guidelines and Measures for the Prohibition of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa' (adopted during the 32nd Ordinary Session in Banjul, Gambia, 17–23 October 2002) para 15.

⁴⁹ See, for example, UN Human Rights Committee, 'Views of the Human Rights Committee under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights Concerning Communication No 470/1991' (Communication submitted by Joseph Kindler, concerning Canada) (Views adopted 30 July 1993) UN Doc CCPR/C/48/D/470/1991. *Advisory Opinion on the Rights and Guarantees of Children* (n 40) para 227–29.

⁵⁰ African Commission on Human and Peoples' Rights, 'General Comment No 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)' (adopted during the 57th Ordinary Session in Banjul, Gambia, 4–18 November 2015) para 23 ('Those States which have abolished the death penalty in law shall not reintroduce it, nor facilitate executions in retentionist States through *refoulement*, extradition, deportation, or other means including the provision of support or assistance that could lead to a death sentence.')

Wong Ho Wing v Peru (Preliminary Objection, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 297 (30 June 2015) [134] ('States that have abolished the death penalty may not expose an individual under their jurisdiction to the real and foreseeable risk of its application and, therefore, may not expel, by deportation or extradition, persons under their jurisdiction, if it can be reasonably anticipated that they may be sentenced to death, without requiring guarantees that the death sentence would not be carried out.').

⁵¹ For a summary of the position under the ECHR, see, for example, *Husayn (Abu Zubaydah) v Poland* App no 7511/13 (ECtHR, 24 July 2014) [450]–[455]. See also Schabas (n 43) 96.

the ECtHR has applied it to Article 2 (right to life),⁵² and, where there is a real risk of a 'flagrant breach' of the right in question, to Article 5 (prohibition of arbitrary detention)⁵³ and Article 6 (right to a fair trial).⁵⁴

7.3.2. Particular applicability issues

Although the applicability of the instrument in question is of pivotal importance to *non-refoulement* in the context of MSOs, as it is in the case of the other substantive rules and norms of IHRL discussed in this thesis, in practice the situation is, in some respects, simpler. Considering Article 3 CAT, it was noted in Chapter Three that the position of the Committee Against Torture is that, 'The State party should apply the *non-refoulement* guarantee to all detainees in its custody...'.⁵⁵ As was explained, although the Committee's position is not universally accepted, it is persuasive and arguably represents the better view of the law.⁵⁶ On that basis, Article 3 CAT is not geographically limited in its scope of application; rather, it will apply whenever an individual is detained, a threshold that should, it is submitted, be construed as broadly as for other IHRL rules applicable to individuals deprived of their liberty.⁵⁷

With respect to the ICCPR, ECHR, ACHR and ACHPR, the applicability of the prohibition on *refoulement* will depend on the applicability of the instrument in question. As explained in Chapter Two, each of these instruments applies throughout the territories of States parties, including their internal waters, territorial sea and any archipelagic waters. Seaward of the territorial sea, each instrument *may* apply extraterritorially, according to the principles set out in Chapter Three. Without rehearsing the full analysis, two bases are especially likely to be relevant in the context of *non-refoulement* and worthy of brief

⁵² See, for example, *Al-Saadoon and Mufdhi v the United Kingdom* ECHR 2010 [123].

⁵³ See, for example, *Othman (Abu Qatada) v the United Kingdom* ECHR 2012-I (extracts) [233].

⁵⁴ See, for example, *Soering* (n 46) [113].

⁵⁵ UN Committee Against Torture, 'Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture: United States of America' (25 July 2006) UN Doc CAT/C/USA/CO/2 para 15.

⁵⁶ See above s 3.2.1.4.

⁵⁷ See above s 5.4.3.

discussion here: flag-State jurisdiction;⁵⁸ and State agent authority and control.⁵⁹

The first of these, flag-State jurisdiction, is particularly likely to arise where individuals, either following rescue or arrest, are transferred to an interdicting ship, thereby falling under the jurisdiction of the flag State. Although, as was noted in Chapter Three, the relevance of this basis for extraterritorial applicability to the ICCPR, ACHR and ACHPR is speculative, it is well established with respect to the ECHR. This is illustrated, in the particular context of *non-refoulement*, by the decision in *Hirsi Jamaa v Italy*,⁶⁰ which concerned the high seas interception by Italian Revenue Police and Coastguard vessels of Somali and Eritrean nationals attempting to reach Italy from Libya.

In *Hirsi*, the migrants, once intercepted, were transferred onto the Italian ships and taken to Tripoli.⁶¹ With regard to applicability, the Grand Chamber observed

that in the instant case the events took place entirely on board ships of the Italian armed forces, the crews of which were composed exclusively of Italian military personnel. In the Court's opinion, in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive de jure and de facto control of the Italian authorities.⁶²

As a result, 'the events giving rise to the alleged violations fall within Italy's "jurisdiction" within the meaning of Article 1 of the Convention.'⁶³ Importantly, this was the case in spite of the characterisation of the incident as a 'rescue operation' and what the Italian government alleged to be the 'minimal control exercised by the authorities over the parties concerned at the material time.'⁶⁴ As illustrated by *Hirsi*, whenever individuals are taken on board a State's warships or other vessels on government service, the ECHR, including the

⁵⁸ See above s 3.3.2.

⁵⁹ See above s 3.3.4.

⁶⁰ *Hirsi Jamaa and Others v Italy* ECHR 2012.

⁶¹ The facts are summarised at *ibid* [9]–[12].

⁶² *ibid* [81].

⁶³ *ibid* [82]. On the question of jurisdiction, see Den Heijer, 'Reflections on *Refoulement* and Collective Expulsion in the *Hirsi* Case' (2013) 25(2) *Intl J of Refugee L* 265, 271–74; Violeta Moreno-Lax, '*Hirsi Jamaa and Others v Italy* or the Strasbourg Court versus Extraterritorial Migration Control?' (2012) 12(3) *Human Rights L Rev* 574, 579–82

⁶⁴ *Hirsi Jamaa* (n 60) [79].

prohibition on *refoulement*, will apply. This will be so even where the control over the individuals once onboard the ship is limited (as was alleged to be the case in *Hirsi*), so it will certainly be the case when individuals are subject to a greater degree of control, such as when individuals are held in close custody having been arrested for their alleged commission of a crime, such as piracy.

Turning to the second basis for extraterritorial applicability particularly likely to arise in the context of *non-refoulement*, State agent authority and control is of relevance to all four treaties in question. As discussed in Chapter Three, the threshold question is whether and when, the conduct of a State, through its agents, does, in fact, amount to the exercise of authority and control over individuals.⁶⁵ Although sometimes clear, this can be difficult to determine; while, in the context of MSOs, it can be met through the control exercised over the vessel on which individuals are located, for example by directing its course and speed, as well as through authority and control over particular individuals, this still does not deal with every conceivable scenario. However, in the specific context of *non-refoulement*, the situation is potentially simpler. This is because the issue of *non-refoulement* only arises when a State has sufficient control over an individual so as actually to be able to expel, extradite or return them to another State. Without repeating the analysis set out in Chapter Three, and noting that the two issues are technically separate in law, it is submitted that whenever a State, through its agents, is in a position to violate the principle of *non-refoulement*, it will almost certainly be exercising sufficient authority and control over the individual in question, such that the relevant IHRL treaty provisions prohibiting *refoulement* will apply. This, furthermore, is consistent with the Committee Against Torture's understanding with respect to Article 3 CAT, discussed above, that the principle of *non-refoulement* is not geographically limited.

A complication does arise, however, where it is suggested that a State is in breach of the prohibition on *refoulement* when it acts through a third party. This situation might arguably arise where a State seeking to prevent the entry into its territory of irregular migrants encourages or persuades the State from which the individuals have departed to intercept them and 'pull' them back to its shores. Just such a scenario is the subject of a current application against Italy to the

⁶⁵ See above s 3.3.4.

ECtHR, involving an incident in which the Libyan coastguard intercepted a migrant dinghy in distress, at the same time as an attempted rescue by a vessel operated by a German non-governmental organisation (NGO).⁶⁶ In what is described as a ‘confrontational’ rescue, a number of migrants were recovered by the Libyan coastguard and returned to Libya; a number were rescued by the NGO and taken to Italy; and a number died. This is set against the context of an agreement between Italy and Libya, under which Italy provides money, training and equipment to the Libyan coastguard,⁶⁷ apparently in return for cooperation in curbing migrant flows. In light of this, the actions of the Libyans in ‘pulling-back’ migrants is presumably, at least in principle, exactly what Italy had hoped to bring about, and, in so doing, avoid engaging the principle of *non-refoulement*, as was held to have happened in *Hirsi* in light of the involvement of Italy’s own vessels.

The key legal question this raises is whether individuals intercepted by the Libyan coastguard are within the jurisdiction of Italy, in light of the involvement of the latter.⁶⁸ In principle, it is conceivable that a State could exercise authority and control through the armed forces, or other government agencies, of another, consistent with the rules of attribution under the law of State responsibility.⁶⁹ This may happen where the latter State places its forces at the

⁶⁶ Moritz Baumgärtel, ‘High Risk, High Reward: Taking the Question of Italy’s Involvement in Libyan “Pullback” Policies to the European Court of Human Rights’ (*EJIL Talk!*, 14 May 2018) <<https://www.ejiltalk.org/high-risk-high-reward-taking-the-question-of-italys-involvement-in-libyan-pullback-policies-to-the-european-court-of-human-rights/>> accessed 6 July 2018.

⁶⁷ ‘Italy-Libya Sign Agreement to Curb Flow of Migrants to Europe’ (*euronews*, 2 February 2017) <<http://www.euronews.com/2017/02/02/italy-libya-sign-agreement-to-curb-flow-of-migrants-to-europe>> accessed 6 July 2018.

⁶⁸ Similar issues were discussed above, in the context of rescue affected by a civilian vessel. See above s 6.3.1.

⁶⁹ David S Goddard, ‘Understanding the Challenge of Legal Interoperability in Coalition Operations’ (2017) 9(2) *J of National Security L & Policy* 211, 221–23. Not discussed in this thesis is the possibility that the acts of one State may be attributable to another where the latter coerces the former to undertake the acts in question. International Law Commission, ‘Articles on Responsibility of States for Internationally Wrongful Acts’ (2001) UN Doc A/56/10, 20 (ARSIWA) art 18. Although technically possible in the type of situation under consideration, the threshold for attribution on this basis is set very high, requiring ‘conduct with forces the will of the coerced State, giving it no effective choice but to comply with the wishes of the coercing State.’ *ibid* commentary to art 18, para 2. See also James Crawford, *State Responsibility: The General Part* (CUP 2013) 419–21. A further possibility, not discussed in this thesis, is the possibility of one

disposal of the former, although this requires the forces in question to be acting under the 'exclusive direction and control [of the receiving State], rather than on instructions from the sending State.'⁷⁰ It could also occur with respect to particular acts of the forces that belong to one State, but which are undertaken on the instructions, or under the direction and control, of another.⁷¹ This might be the case if a coastguard vessel of one State responds to an incident on the instructions of the coastal authorities of another, or even, plausibly, if a State is involved in the planning and supervision of the coastguard of another.⁷² However, while noting that it remains to be seen exactly what the extent of Italy's involvement with Libya's coastguard in this particular case was, it is unlikely that funding, training or equipping another State's coastguard would be sufficient.⁷³

7.3.3. Issues arising in the implementation of the principle of non-refoulement in the course of MSOs

The applicability of IHRL, and hence the prohibition on *refoulement*, to individuals brought within the jurisdiction of a State during the course of MSOs may amount to a significant restraint on the freedom to deal with them as they may otherwise have wished. However, it must be recognised that the principle of *non-refoulement* does not equate to an outright prohibition on transfer to another State.⁷⁴ Expulsion, return and extradition are explicitly contemplated in Article 3 CAT, with such transfers only prohibited in the circumstances defined

State providing aid or assistance to another; under art 16 ARSIWA, the assisting State commits a separate internationally unlawful act through its assistance, rather than the original act being attributable to it. ARSIWA (n 69) art 16.

⁷⁰ ARSIWA (n 69) commentary to art 6, para 2. See also Crawford (n 69) 132–36.

⁷¹ ARSIWA (n 69) commentary to art 6, para 3 ('Situations can also arise where the organ of one State acts on the joint instructions of its own and another State In these cases, the conduct in question is attributable to both States under other articles of this chapter.'). In this case, responsibility arises under art 8: 'The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the directions and control of, that State in carrying out the conduct.' *ibid* art 8.

⁷² *ibid* commentary to art 8 paras 4–8.

⁷³ This is likely to be case whether a test of 'effective control' or 'overall control' is applied. *ibid* commentary to art 8 paras 4–8.

⁷⁴ See, for example, Petrig (n 7) 320–23.

by the provision. Both the HRC and ECtHR have stated explicitly that extradition is not unlawful, *per se*, under either the ICCPR⁷⁵ or ECHR⁷⁶ respectively. Indeed, the ECtHR has recognised the importance of not creating ‘safe havens for fugitives[, which] would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition.’⁷⁷ It has also reiterated the right of a State, ‘as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there.’⁷⁸

Instead, under each of the instruments, *refoulement* is prohibited in specific circumstances, specifically where the State expels, returns or extradites an individual in spite of a known risk that rights protected under the respective instruments may be violated. This section highlights three areas of particular note with respect to the implementation of the principle in practice: the scope of the determination that is to be made; the procedural obligations that States must meet; and the role of assurances given by States to which individuals are to be expelled, extradited or returned.

7.3.3.1. The scope of the determination to be made

The broad potential scope of the *non-refoulement* principle under the ICCPR, ECHR, ACHR and ACHPR means that a wider assessment must be made of the risks faced by those potentially subject to *refoulement* than would be the case under Article 3 CAT, or, indeed the Refugee Convention. Not only must the risk of ill-treatment beyond the narrow category of torture be considered, but potentially also the risk of arbitrary detention, as well as the risk, at least so far as the ECHR is concerned that individuals will suffer a ‘flagrant’ denial of their fair trial rights. The latter protection is likely to be of particular relevance to States transferring pirates and other detainees to regional States for

⁷⁵ See, for example UN Human Rights Committee, ‘Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights Concerning Communication No 117/1981’ (Communication submitted by the family of MA, later joined by MA, concerning Italy) (Views adopted 10 April 1984) UN Doc A/39/40, 190 para 13.4.

⁷⁶ See, for example, *Soering* (n 46) para 85.

⁷⁷ *ibid* para 89.

⁷⁸ See, for example, *Ustinov v Russia* App No 7994/14 (ECtHR, 8 November 2016) [42] (citing *Abdulaziz, Cabales and Balkandali v the United Kingdom* Series A no 94 (ECtHR) [67]). See also Schabas (n 43) 395.

prosecution, in circumstances where fair trial rights may be less than perfectly protected.⁷⁹

Furthermore, it is insufficient for States to consider only the risk of rights violations in the particular country to which an individual is expelled, returned or extradited. To do otherwise would allow a State to circumvent the prohibition through the use of an intermediary State, defeating its object and purpose. States must therefore also take into account the risk of violations in a third country to which it is foreseeable that an individual may subsequently be transferred.⁸⁰

For example, in *Hirsi*, the applicants argued that they had potentially faced treatment in violation of Article 3 ECHR not only in Libya, to which they were returned by the Italian authorities, but also in their countries of origin, Somalia and Eritrea, to which they claimed they may subsequently have been transferred. The ECtHR took the view that, in light of the situation in Somalia and Eritrea, subsequent repatriation would arguably breach Article 3,⁸¹ and that Italy could not rely on the Libyan authorities to mitigate that risk. The Court considered

that when the applicants were transferred to Libya, the Italian authorities knew or should have known that there were insufficient guarantees protecting the parties concerned from the risk of being arbitrarily returned to their countries of origin, having regard in particular to the lack of any asylum procedure and the impossibility of making the Libyan authorities recognise the refugee status granted by the UNHCR.⁸²

The obligation to consider subsequent transfer in determining whether an individual ought to be protected from *refoulement* thus further complicates an already difficult determination to be made by States.

⁷⁹ See, for example, Tullio Treves and Cesare Pitea, 'Piracy, International Law and Human Rights' in Nehal Bhuta (ed), *The Frontiers of Human Rights: Extraterritoriality and its Challenges* (OUP 2016) 122–24.

⁸⁰ See, for example, *Advisory Opinion on the Rights and Guarantees of Children* (n 40) para 221; HRC General Comment 31 (n 41) para 12. See also Nowak and McArthur (n 22) 178–79.

⁸¹ *Hirsi Jamaa* (n 60) para 151–52. See also Den Heijer (n 63) 278–80.

⁸² *Hirsi Jamaa* (n 60) para 156.

7.3.3.2. Procedural obligations

Turning to the practical implementation of the prohibition on *refoulement*, there is potential overlap with other procedural obligations contained in the instruments under examination. The ICCPR, ACHR and ACHPR each contain provisions affording due process rights to aliens ‘lawfully in the territory of a State Party’ (or, equivalently, ‘non-national[s] legally admitted in a territory of a State Party’ in the case of the ACHPR).⁸³ Protocol 7 to the ECHR contains a similar provision, but applicable to aliens ‘lawfully *resident* in the territory of a State’.⁸⁴ However, not only do these provisions provide only procedural guarantees, rather than any substantive guarantee against expulsion,⁸⁵ but they apply to a significantly narrower category of individuals than those that benefit from protection against *refoulement*.

The Human Rights Committee has emphasised that the phrase, ‘lawfully in the territory of a State party’, ‘means that national law concerning the requirements for entry and stay must be taken into account in determining the scope of that protection, and that illegal entrants and aliens who have stayed longer than the law or their permits allow, in particular, are not covered by its provisions.’⁸⁶ It went on to state that any dispute about the legality of an alien’s presence in the territory of a State should be settled in accordance with Article 13.⁸⁷ Nevertheless, the requirement of lawful presence in the territory of a State is a significant restriction on its applicability. While there is no reason to exclude the territorial sea, internal waters and archipelagic waters from the ‘territory’ in which the provision applies,⁸⁸ the requirement of lawful presence may be harder to satisfy. Individuals passing through the territorial sea might be argued to be lawfully in the territory of the coastal State, so long as they comply with the

⁸³ ICCPR (n 1) art 13, ACHR (n 4) art 22(6); ACHPR (n 3) art 12(4).

⁸⁴ Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 22 November 1984, entered into force 1 November 1988) ETS 117 art 1.

⁸⁵ Office of the United Nations High Commissioner for Refugees, ‘Expulsion of Aliens in International Human Rights Law’ (Discussion Paper) (September 2006) (UNHCR Discussion Paper) 10.

⁸⁶ UN Human Rights Committee, ‘General Comment No 15’ (11 April 1986) UN Doc HRI/GEN/1/Rev.1, 18 (HRC General Comment 15) para 9.

⁸⁷ *ibid* para 9.

⁸⁸ See above ch 2.

requirements of innocent passage, including passage to reach a port facility.⁸⁹ However, a vessel is in violation of the innocent passage regime where it participates in 'the loading or unloading of any...person contrary to the...immigration...regulations of the coastal State';⁹⁰ furthermore, where a vessel enters a State's territorial sea in order to proceed to a port facility, the State is entitled 'to take the necessary steps to prevent any breach of the conditions to which [access to the port] is subject.'⁹¹ It will therefore only be in the case of compliance with the coastal State's maritime immigration laws that the presence of an individual attempting to reach the shore could reasonably be considered lawful.

The application of Article 1 of Protocol 7 to the ECHR is even narrower, being restricted only to those lawfully *resident* in the territory of the State concerned. The Explanatory Report accompanying Protocol 7 makes clear that lawful residence is a narrower concept than lawful presence in a State's territory. Specifically, it excludes those who have 'arrived at a port or other point of entry but [have] not yet passed through the immigration control or who has been admitted to the territory for the purpose only of transit or for a limited period for a non-residential purpose.'⁹² Put more simply, the ECtHR has observed that the 'wording [of Article 1 of Protocol 7] cannot be ignored.'⁹³ It obviously follows that an individual passing through the territorial sea, whether complying with the requirements of innocent passage or not, without clearing the State's immigration process, will not be lawfully resident and will not benefit from Article 1 of Protocol 7.

Of greater potential relevance is the prohibition on the 'collective expulsion of aliens', contained in the ACHR and Protocol 4 to the ECHR,⁹⁴ along with the equivalent prohibition on '[t]he mass expulsion of non-nationals' contained in

⁸⁹ UNCLOS (n 9) arts 17–19.

⁹⁰ *ibid* art 19(2)(g).

⁹¹ *ibid* art 25(2).

⁹² Council of Europe, 'Explanatory Report to the Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms' (22 November 1984) para 9. See also Schabas (n 43) 1128.

⁹³ *Hirsi Jamaa* (n 60) 173.

⁹⁴ ACHR (n 4) art 22(9), Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 16 September 1963, entered into force 2 May 1968) ETS 46 art 4.

the ACHPR,⁹⁵ the chief effect of which is to require an examination of each individual's case.⁹⁶ Although it is not immediately obvious that the term 'expulsion' is capable of extension to the transfer of individuals within the jurisdiction of one State at sea to another, the ECtHR in *Hirsi* held that it was applicable at least in the case of irregular migrants brought on board Italian naval vessels on the high seas,⁹⁷ stating that

the removal of aliens carried out in the context of interceptions on the high seas by the authorities of a State in the exercise of their sovereign authority, the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State, constitutes an exercise of jurisdiction within the meaning of Article 1 of the Convention which engages the responsibility of the State in question under Article 4 of Protocol No. 4.⁹⁸

On the facts of the case in *Hirsi*, the Grand Chamber went on to find there to have been a breach of Article 4 of Protocol 4 because:

the transfer of the applicants to Libya was carried out without any form of examination of each applicant's individual situation. It has not been disputed that the applicants were not subjected to any identification procedure by the Italian authorities, which restricted themselves to embarking all the intercepted migrants onto military ships and disembarking them on Libyan soil. Moreover, the Court notes that the personnel aboard the military ships were not trained to conduct individual interviews and were not assisted by interpreters or legal advisers.

That is sufficient for the Court to rule out the existence of sufficient guarantees ensuring that the individual circumstances of each of those concerned were actually the subject of a detailed examination.⁹⁹

Not only, therefore, does the prohibition on collective expulsion require an individual, detailed, examination of each individual's case, but the examination must be conducted by suitably qualified individuals working alongside, where appropriate, interpreters. Furthermore, individuals should have access to legal advice.

⁹⁵ ACHPR (n 3) art 12(5).

⁹⁶ See, for example, *Nadege Dorzema et al v Dominican Republic* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 251 (24 October 2012) [171], [175]; UNHCR Discussion Paper (n 85) 15–16.

⁹⁷ *Hirsi Jamaa* (n 60) [161]–[182]. See also Den Heijer (n 63) 280–85; Moreno-Lax (n 63) 586–89.

⁹⁸ *Hirsi Jamaa* (n 60) [180].

⁹⁹ *Ibid* [185].

It is not, however, clear that the prohibition of collective expulsion will apply to all circumstances in which the prohibition on *refoulement* applies. In particular, the reasoning of the Grand Chamber in *Hirsi*, characterising a situation of maritime *refoulement* as a form of expulsion, is arguably confined to the specific context of irregular migration. Therefore, although the reasoning could be plausibly extended to, for example, the transfer of individuals suspected of involvement in piracy, or other crimes, for trial in another State, this remains somewhat speculative.

This uncertainty is, however, is arguably immaterial to the requirement for an individual determination of the risk that the prohibition on *refoulement* will be violated, in light of the right of individuals under the ICCPR, ECHR, ACHR and ACHPR to an effective remedy with respect to violations of substantive rights.¹⁰⁰

¹⁰⁰ Under art 3 ICCPR, 'Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; ...'. ICCPR (n 1) art 3. Under art 25 ACHR:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
2. The States Parties undertake:
 - a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
 - b. to develop the possibilities of judicial remedy; and
 - c. to ensure that the competent authorities shall enforce such remedies when granted.

ACHR (n 4) art 25. Finally, under art 7 ACHPR:

Every individual shall have the right to have his cause heard. This comprises:

Under Article 13 ECHR, for example, ‘Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.’¹⁰¹ The ECtHR has interpreted this as meaning, in the context of individual alleging potential violations of Article 3, that there must be ‘firstly “independent and rigorous scrutiny” of any complaint made by a person in such a situation, where “there exist substantial grounds for fearing a real risk of treatment contrary to Article 3” and secondly, “the possibility of suspending the implementation of the measure impugned”’.¹⁰² On the facts of *Hirsi*, the ECtHR found Article 13 to have been violated on account of the lack of information provided to the applicants, alongside their inability to lodge a complaint with a competent authority in order ‘to obtain a thorough and rigorous assessment of their requests before the removal measure was enforced.’¹⁰³

The difficulty of giving adequate protection from *refoulement* while at sea has been recognised elsewhere. The ACHR has stated that, ‘Regarding the interception of asylum seekers in international waters so as not to allow their requests to be evaluated in potential host States, the Court understands that this practice is contrary to the principle of *non-refoulement*, because it does not permit the evaluation of each person’s specific risk factors.’¹⁰⁴ Similarly, the views of UNHCR are informative, notwithstanding that they are expressed specifically with respect to refugee status determination, rather than *non-refoulement* more generally under IHRL. UNHCR takes the position that, ‘Processing onboard maritime vessels is generally not appropriate’,¹⁰⁵ but does accept that, in exceptional circumstances, ‘profiling or pre-screening’ may offer

The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; ...

ACHPR (n 3) art 7. The equivalent ECHR provision is set out below.

¹⁰¹ ECHR (n 2) art 13.

¹⁰² *Hirsi Jamaa* (n 60) [198] (citations omitted).

¹⁰³ *ibid* [205]. See also Moreno-Lax (n 63) 589–92.

¹⁰⁴ *Advisory Opinion on the Rights and Guarantees of Children* (n 40) para 220.

¹⁰⁵ Office of the United Nations High Commissioner for Refugees, ‘Maritime Interception Operations and the Processing of International Protection Claims: Legal Standards and Policy Considerations with Respect to Extraterritorial Processing’ (Protection Policy Paper) (November 2010) para 55.

a means to identify individuals in need of protection from *refoulement*.¹⁰⁶ Nevertheless, 'if during profiling a person expresses in any manner a need for international protection, or there is any doubt whether an individual may be in need of international protection, referral to [refugee status determination] is the required response.'¹⁰⁷ In the view of UNHCR, full refugee status determination will generally not be possible at sea in light of the difficulty in providing adequate reception facilities.¹⁰⁸ If the required standards could be met, then it be only in cases that 'could be decided quickly, i.e. manifestly founded or unfounded cases' that would be appropriate.¹⁰⁹

As noted above, the views of UNHCR apply, strictly speaking, to the determination of refugee status, rather than the procedural obligations flowing from the principle of *non-refoulement* contained in IHRL. However, their concerns are arguably equally relevant to *refoulement* decisions under IHRL as they are to refugee status determinations, particularly in light of the requirements identified by the ECtHR in *Hirsi* and discussed above. While a decision as to *refoulement* made at sea is not unlawful per se, satisfying the requirement for a detailed examination, with independent and rigorous scrutiny will undoubtedly be challenging.

7.3.3.3. Assurances

A common mechanism by which individuals may be expelled, returned or extradited in spite of a *prima facie* concern about rights violations is by obtaining assurances from the government of the State to which *refoulement* is proposed. Ultimately, the point of this, clearly, is to reduce the risk of rights violations below the level required to trigger protection from *refoulement*, either with respect to a specific case or on an enduring basis. Such assurances are well established in some contexts, perhaps most notably with respect to capital punishment, notwithstanding challenges to their credibility and therefore validity in this context.¹¹⁰ Indeed, such assurances may be necessary to avoid a violation of the prohibition against *refoulement*, particularly where the risk of

¹⁰⁶ *ibid* para 55.

¹⁰⁷ *ibid* para 55.

¹⁰⁸ *ibid* para 56.

¹⁰⁹ *ibid* para 57.

¹¹⁰ Schabas (n 43) 145.

mistreatment arises in connection not with respect to the State to which the individual is to be initially returned, but rather with respect to one to which they may be subsequently transferred. This is illustrated, again, by the decision in *Hirsi*, in which the ECtHR concluded ‘that the Italian Government [was required to] take all possible steps to obtains assurances from the Libyan authorities that the applicants will not be subjected to treatment incompatible with Article 3 of the Convention *or arbitrarily repatriated*.’¹¹¹

While assurances may be appropriate in some contexts, they cannot displace the requirement to make a proper determination as to protection from *refoulement*. If a real risk of rights violations remains, in spite of any assurances, then the *non-refoulement* obligation will still apply. Furthermore, assurances have been controversial in the particular context of ‘rendition’ to states in which torture is suspected of being carried out. Not only is it argued that such assurances are unreliable, but also that they undermine the absolute prohibition on torture.¹¹² Nevertheless, assurances remain an important feature of practice with respect to *refoulement*.

7.4. Conclusion

This chapter has not attempted to provide a comprehensive account of the principle of *non-refoulement* in IHRL. Rather it has sought to make a number of points that illustrate the relevance, and importance, of the prohibition of *refoulement* under IHRL to the conduct of MSOs, as well as some important issues relating to its application in practice. Before doing so, and in order to place the discussion in context, relevant rules from other bodies of law were briefly outlined. First, the law of sea provides an associated obligation to render those rescued to a ‘place of safety’. However, although the qualification of a particular place as one of safety may depend, to some extent, on the risk of human rights violations, the law of the sea rule is, in some respects, very narrow in its scope, applying only in connection with rescue, rather than all those who may fall under the control of a State at sea, such as those detained on suspicion of offences such as piracy. Second, the chapter briefly covered *non-refoulement* as it exists in refugee law. However, although obviously an

¹¹¹ *Hirsi Jamaa* (n 60) [211] (emphasis added).

¹¹² Nowak and McArthur (n 22) 212–17.

important principle in its own right, it applies only with respect to those who qualify for refugee status, and is subject to considerable controversy, if not doubt, with respect to its extraterritorial applicability. It arguably therefore has limited relevance to MSOs.

Turning to IHRL, the first point is that it may prohibit *refoulement* in a much wider range of circumstances than refugee law, or in which the 'place of safety' requirement applies under the law of the sea. In terms of applicability, it applies with respect to all individuals within the jurisdiction of a State, a criterion likely to be met whenever a State exercises sufficient control over an individual such as to be able to effect transfer to another State. It also applies with respect to the risk of violation of a number of rights, not limited to freedom from torture (except under the CAT), but also to other rights, including the freedom from cruel and inhuman treatment or punishment, the right to life, and even, at least with respect to the risk of particularly flagrant abuses under the ECHR, the right to liberty and the right to a fair trial.

With respect to the implementation of the prohibition of *non-refoulement*, the requirement for an individual determination of risk potentially imposes a considerable obstacle to the transfer of individuals who fall within the jurisdiction of a State at sea. Although the various express procedural obligations set out above may not apply either at all, or in all circumstances in which *non-refoulement* arises in connection with MSOs, an individual assessment is nevertheless invariably required. While there is no fundamental reason why this cannot be done at sea, to do so may in practice be difficult, if not impossible, in any but the clearest of circumstances. Furthermore, although assurances from States to which *refoulement* is proposed can play an important role in meeting the relevant obligations, an assurance that an individual's rights will not be violated cannot, in itself, absolve the transferring State from the requirement to conduct an individual assessment.

8. The Policing of Protest at Sea

8.1. Introduction

Previous chapters have described how specific activities undertaken in the course of maritime security operations (MSOs) are constrained and regulated by human rights law. However, the decision to mount an operation may itself be subject to human rights considerations. Specifically, the obligation to respect certain rights enjoyed by individuals may preclude action that would otherwise be permitted under the law of the sea. This chapter will explore an important example of this, the policing of protest at sea, in which a State's legitimate aims in, for example, preventing disorder, must be weighed and balanced against the freedoms of expression and assembly enjoyed by the protestors.

The chapter begins with a short analysis of the powers contained in the law of the sea that are relevant to the regulation of protest. As will be explained, coastal States enjoy considerable latitude to regulate protest in their internal waters and territorial sea, with diminishing authority further out in their contiguous zone and exclusive economic zone (EEZ). The chapter then moves on to a description of the rights under international human rights law (IHRL) most relevant to protest: the freedoms of expression and assembly. As will be discussed, these freedoms are generally considered hand-in-hand with respect to protest. Under both there are similar criteria for lawful interference, depending most importantly on the necessity and proportionality of the measures adopted in achieving a legitimate aim on the part of the State.

The chapter next sets out the limited, but important, jurisprudence relating to the application of IHRL to protest at sea. Two cases considered by the European Court of Human Rights (ECtHR) disclose useful guidance as to how human rights relating to protest are applied in a maritime context. A further case dealt with under the UN Convention on the Law of the Sea (UNCLOS)¹ compulsory dispute resolution procedure then provides valuable insight into the application of human rights norms outside of a human rights court or treaty body.

¹ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS).

Finally, the chapter concludes with an analysis of the law in light of the jurisprudence that has been discussed. This reveals further important examples of the relationship between the law of the sea and human rights law, as well as the role of human rights law in regulating MSOs. As is demonstrated, the law of the sea is likely to provide the legal basis for interfering with rights related to protest sea, while, at the same time, IHRL provides restraint to the measures that might otherwise be considered permissible pursuant to that legal basis.

8.2. Notable practice relating to the policing of protest

Courts have, on a small number of occasions, dealt directly with alleged violations of human rights related to protest at sea. The most prominent of the cases considered by the ECtHR is that of *Women on Waves and others v Portugal*,² which concerned the prevention by Portugal of the entry into its territorial sea of a Dutch-flagged vessel, the *Borndiep*, which was intended to be used to promote reproductive rights in Portugal. The *Borndiep* was chartered by the charity 'Women on Waves' with the intention of sailing to a Portuguese port, where various seminars and workshops would be held on board to discuss issues including family planning and the decriminalization of abortion.³ However, in anticipation of the *Borndiep*'s arrival, the Portuguese government issued a decree asserting the government's belief that the *Borndiep* would be used to distribute drugs and carry out procedures related to abortion, as well as to encourage abortion, contrary to Portuguese domestic law. The decree purported to rely on powers contained in domestic law to prohibit the entry of the *Borndiep* into the Portuguese territorial sea, citing also the section of UNCLOS setting out the innocent passage regime, together with Portuguese health laws.⁴ A Portuguese warship was despatched to enforce the decree by preventing the entry of the *Borndiep* into the Portuguese territorial sea.⁵

Attempts within the Portuguese domestic legal system to compel the authorities to allow entry of the *Borndiep* into the territorial sea, relying in part on the

² *Women on Waves and Others v Portugal* App No 31276/05 (ECtHR, 3 February 2009). For discussion, see Tullio Treves, 'Human Rights and the Law of the Sea' (2010) 28 Berkeley J of Intl L 1, 10–11.

³ *Women on Waves* (n 2) [7].

⁴ *ibid* [8].

⁵ *ibid* [9].

freedoms of expression and of assembly, were unsuccessful.⁶ An application was subsequently made to the ECtHR, alleging violations of Articles 10 and 11 of the European Convention on Human Rights (ECHR).⁷ The applicants argued that they intended only to impart information concerning reproductive rights. They had no intention of violating Portuguese domestic law and, if the aim of the government was to avert any such breach, preventing the entry of the *Borndiep* into the territorial sea was a disproportionate means of doing so.⁸ The government argued that preventing the entry of the *Borndiep* did not, in itself, infringe the applicants' rights under Article 10 and 11, as they could still arrange meetings and disseminate information in Portugal without sailing a ship into Portuguese waters.⁹ If the relevant rights were found to have been infringed, it argued that a legal basis for this could be found in the innocent passage regime under UNCLOS, when considered in light of the anticipated violation of Portuguese domestic law. According to the government, preventing the entry of the *Borndiep* was a proportionate means of achieving the legitimate aim of protecting public order and health.¹⁰ However, as discussed below, the ECtHR ultimately rejected the government's arguments and found there to have been a violation of Article 10.¹¹

The ECtHR had also earlier considered freedom of expression in a maritime context in *Drieman and others v Norway*,¹² albeit only reaching the stage of determining admissibility. This meant that the case was decided on the basis of the applicants' submissions alone and the Court's decision must, therefore, be treated with caution. Nevertheless, it provides a valuable counterpoint to the *Women on Waves* judgment.

Drieman and others concerned a complaint that Norway had violated Articles 10 and 11 ECHR in its policing of *Greenpeace* ships disrupting whaling activities in the Norwegian EEZ. It involved the actions taken by the Norwegian authorities

⁶ *ibid* [10]–[14].

⁷ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) arts 10–11.

⁸ *Women on Waves* (n 2) [23]–[24].

⁹ *ibid* [25].

¹⁰ *ibid* [26].

¹¹ *ibid* [44].

¹² *Drieman and Others v Norway* (Admissibility) App no 33678/96 (ECtHR, 4 May 2000). The decision is not paginated or paragraph-numbered.

in response to two specific incidents in which one of the *Greenpeace* ships, the *MS Solo*, attempted to prevent the harpooning of whales by a Norwegian vessel, the *Senet*. In the first incident, the *Solo* deployed dinghies, which manoeuvred across the bows of the *Senet*, forcing it to change course, as well as scaring away the whale being pursued by the *Senet* with the sound of their engines. The Norwegian coastguard intervened, forcing one dinghy away and seizing another, but failing to prevent a third from successfully disrupting the *Senet*'s activities. Three days later, the *Solo* again interfered with the *Senet*, on this occasion itself manoeuvring to force the *Senet* to change course, as well as using its water cannon to impair the *Senet*'s visibility of the whale. This, again, had the effect of preventing the *Senet* catching the whale it had been pursuing.¹³

Four individuals from the *Solo* were arrested: three members of the crew, including two who had operated dinghies during the first incident, along with the *Greenpeace* campaign director. They were prosecuted under the Norwegian Sea-Water Fisheries Act, domestic legislation prohibiting manoeuvring in fishing zones so as to endanger fishing gear or reduce the opportunity of fishing vessels to catch fish. Each was convicted and fined; in addition, the dinghy seized during the first incident was confiscated. Subsequent appeals to higher Norwegian courts, including arguments that the convictions were incompatible with Articles 10 and 11 ECHR, failed.¹⁴ The individuals complained to the ECtHR that their rights under Article 10 and 11 ECHR had been violated, claiming that their activities were protected by those articles and that Norway's interference with them was unlawful. Ultimately, however, as discussed below, the ECtHR determined that the government's actions were within its margin of appreciation; it found that 'the interference complained of was supported by relevant and sufficient reasons, was proportionate...and could reasonably be viewed as necessary in a democratic society.'¹⁵

The final notable case touching on the application of human rights law to the regulation of protest at sea is that of the *Arctic Sunrise* arbitration between the

¹³ *ibid.*

¹⁴ *ibid.*

¹⁵ *ibid.*

Netherlands and the Russian Federation.¹⁶ This concerned the arrest in September 2013 by the Russian authorities of the *Arctic Sunrise*, a Dutch-flagged *Greenpeace* vessel, and its crew of thirty, in response to a protest mounted by the *Arctic Sunrise* in the vicinity of a Russian oil platform located in the Barents Sea, within Russia's EEZ.¹⁷ Surrounding the installation was a 500 metre zone in which the Russian authorities purported to prohibit navigation, together with a 3nm zone in which a danger to navigation was declared.¹⁸ The protest, which was intended to highlight the environmental risks associated with oil-drilling in the Arctic, was planned to involve protestors scaling the oil platform and establishing a camp within a 'survival capsule' attached to the structure. A Russian Coast Guard vessel, the *Ladoga*, intervened, deploying boats in an attempt to disrupt those launched by the *Arctic Sunrise* carrying protestors and their equipment. This was claimed to have involved ramming the *Greenpeace* boats, as well as attempting to slash their inflatable hulls and aiming weapons at the occupants. Two protestors managed to begin climbing the structure, but were forced to retreat as a result of water cannon being directed at them from the platform. They were taken aboard one of the Russian boats and detained.¹⁹

Over the next few hours the *Ladoga* pursued the *Arctic Sunrise*, demanding that it stop and allow itself to be boarded. The *Ladoga* threatened, then fired, flares and warning shots. Eventually a Russian helicopter was deployed, from which a special forces team descended onto the *Arctic Sunrise* and arrested the vessel.²⁰ The crew of the *Arctic Sunrise* were charged with various offences and held in custody until their release on bail in November 2013, followed by a subsequent grant of amnesty in December 2013. The ship itself was held under arrest until June 2014.²¹

The measures taken against the *Arctic Sunrise* and its crew were the subject of a claim by Netherlands to the ITLOS, alleging various violations on the part of Russia of various obligations under UNCLOS and customary international law. The claim eventually became the subject of arbitration, albeit without Russian

¹⁶ *The Arctic Sunrise Arbitration (The Kingdom of the Netherlands v The Russian Federation)* (Merits) PCA Case No 2014-02 (14 August 2015).

¹⁷ *ibid* [4]–[20].

¹⁸ *ibid* [199]–[220].

¹⁹ *ibid* [81]–[92].

²⁰ *ibid* [93]–[102].

²¹ *ibid* [3].

participation.²² Nevertheless, the matter proceeded to an award on the merits, dealing with a number of specific complaints on the part of the Netherlands. In support of this, a detailed amicus brief, submitted on behalf of *Greenpeace*, focused on the application of human rights law in the case. This included the argument that Russia's activities amounted to infringements of the protestors' freedoms of expression and assembly,²³ that these were justiciable within the arbitral process,²⁴ and that the infringement of those rights by the Russian authorities were disproportionate.²⁵

In the course of the proceedings the Netherlands clarified that it was not seeking a finding on the part of the arbitral tribunal that provisions of the International Covenant on Civil and Political Rights (ICCPR)²⁶ had, in themselves, been breached. Rather, it argued that the applicable provisions of UNCLOS, in particular the reasonableness of Russia's actions, fell to be interpreted in light of relevant human rights law.²⁷ The arbitral tribunal accepted this to the extent that it was permitted to have regard to rules of customary international law, and therefore customary human rights law, but not directly to the treaty provisions themselves.²⁸ Nevertheless, the case remains a relevant point of reference for the present enquiry.

8.3. Regulation of protest under the law of the sea

UNCLOS does not directly address the subject of protest or its policing. Nevertheless, it contains numerous provisions of relevance. First of all, as recognised in Article 2, the coastal State has sovereignty over its territorial sea and internal waters and therefore has jurisdiction to enact and enforce laws

²² *ibid* [4]–[20].

²³ 'Memorial of the Kingdom of the Netherlands' (The *Arctic Sunrise* Arbitration, PCA Case No 2014-02, 31 August 2014) (Memorial of the Kingdom of the Netherlands) paras 210–24; 'Amicus Curiae Submission by Stichting Greenpeace Council (Greenpeace International)' (The *Arctic Sunrise* Arbitration, PCA Case No 2014-02, 15 September 2014) (Greenpeace *amicus* brief) paras 53–123.

²⁴ Memorial of the Kingdom of the Netherlands (n 23) paras 129–35; Greenpeace *amicus* brief (n 23) paras 18–27.

²⁵ Memorial of the Kingdom of the Netherlands (n 23) para 249.

²⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

²⁷ *Arctic Sunrise* (n 16) [195].

²⁸ *ibid* [197]–[198].

concerning vessels in those zones, including laws regulating activities related to protest.²⁹ Importantly, this is subject to the right of innocent passage,³⁰ according to which the coastal State is largely precluded from exercising its jurisdiction over vessels abiding by the regime.³¹ However, protest related activities are likely to violate one or more of the requirements of innocent passage, most notably the general requirement that passage be continuous and expeditious;³² the requirement that innocent passage not be 'prejudicial to the peace, good order or security of the coastal State';³³ and the prohibition of 'activity not having a direct bearing on passage.'³⁴ Within the innocent passage regime, the coastal State is also entitled to adopt laws and regulations that relate to specific matters that may be of relevance to protest, including 'the safety of navigation and the regulation of maritime traffic'.³⁵ Where a vessel is in violation of the innocent passage regime, so long as it does not enjoy immunity, the coastal State is entitled to take necessary steps to prevent its passage.³⁶ Furthermore, while the coastal State should not enforce its criminal jurisdiction on a ship passing through its territorial sea except in specific circumstances,³⁷ one of these is where 'the crime is of a kind to disturb the peace of the country or the good order of the territorial sea'.³⁸ Consequently, the law of the sea provides substantial scope for the coastal State to regulate protest in its territorial sea.

The rights of the coastal State diminish beyond the territorial sea. Nevertheless, the law of the sea allows for the exercise of jurisdiction in several situations of relevance to protest. In the contiguous zone the coastal State is permitted to prevent and punish infringements of laws and regulations relating to 'customs, fiscal, immigration or sanitary' matters.³⁹ In the EEZ, the coastal State has jurisdiction over activities that infringe its sovereign rights over living resources,

²⁹ UNCLOS (n 1) art 2.

³⁰ *ibid* arts 18, 19.

³¹ *ibid* arts 21, 25, 27, 28.

³² *ibid* art 18(2).

³³ *ibid* art 19(1).

³⁴ *ibid* art 19(2)(i).

³⁵ *ibid* art 21(1).

³⁶ *ibid* art 25(1).

³⁷ *ibid* art 27. This rule is ultimately hortatory in nature. See above s 2.3.

³⁸ UNCLOS (n 1) art 27(1)(b).

³⁹ *ibid* art 33(1).

including rights to board and inspect vessels suspected of being in violation of the laws or regulations it creates to protect those rights, and to arrest the vessel and its crew.⁴⁰ In addition, the coastal State is entitled to establish safety zones around artificial islands and other structures in its EEZ, 'in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures.'⁴¹

The rights of States to regulate protest on the high seas, beyond areas throughout which it is permitted to protect its rights, is much more limited. While States generally have exclusive jurisdiction over their own flagged vessels,⁴² with respect to other vessels they may exercise jurisdiction only in limited circumstances. Most importantly, a right of visit exists with respect to vessels reasonably suspected of: being engaged in piracy; being engaged in the slave trade; unauthorised broadcasting; or being stateless.⁴³ Of these, both unauthorized broadcasting and, potentially, piracy, may be particularly relevant to protest. The right to visit vessels engaged in unauthorised broadcasting is only available in certain circumstances, but includes the situation where the unauthorised transmissions can be received in the State concerned.⁴⁴ Hence, where a protest is conducted by means of broadcasts made from a vessel located on the high seas, a State in which those broadcasts are received may exercise its jurisdiction over the vessel.

With respect to piracy, an act of protest may meet the definition of piracy, thereby permitting a foreign State to exercise its jurisdiction over the vessel concerned. Piracy is defined by Art 101 UNCLOS as

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

⁴⁰ *ibid* art 73.

⁴¹ *ibid* art 60.

⁴² *ibid* art 92.

⁴³ *ibid* art 110.

⁴⁴ *ibid* art 109.

- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).⁴⁵

Where, therefore, an act of protest involves the use of unlawful violence by individuals on board one ship, against those on another,⁴⁶ it may amount to piracy. However, the requirement that acts of piracy be ‘committed for private ends’ has proved controversial, specifically in the context of acts undertaken for a political purpose, rather than for material gain, as is likely to be the case for protest.⁴⁷ However, although some authors have argued that acts taken for political reasons are excluded,⁴⁸ Guilfoyle argues persuasively that the private ends requirement excludes only acts with ‘State sanction or authority’, possibly as well as the acts of ‘insurgencies attacking the government vessels of their state of nationality.’⁴⁹ Consistent with this view, an opinion of the United States Court of Appeal for the Ninth Circuit concluded that violent acts by anti-whaling protestors were committed for private ends and therefore amounted to piracy.⁵⁰

⁴⁵ Although the definition refers to the high seas, the definition of piracy extends to other maritime zones seaward of the territorial sea. *ibid* arts 58, 78. See also Robin Geiß and Anna Petrig, *Piracy and Armed Robbery at Sea* (OUP 2011) 63–64.

⁴⁶ There must be two ships involved. See, for example, Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (CUP 2009) 40; Geiß and Petrig (n 45) 62–63.

⁴⁷ See, for example, Guilfoyle (n 46) 32–42; Geiß and Petrig (n 45) 61–62; Clyde H Crockett, ‘Toward a Revision of the International Law of Piracy (1976) 26(1) DePaul Law Review 78, 84–87; Efthymios Papastavridis, *Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Hart 2013) 163–64.

⁴⁸ See, for example, Crockett (n 47) 87; Kevin Jon Heller, ‘Judge Kozinski’s “Rich History” of Piracy’ (Opinio Juris, 27 February 2013) <<http://opiniojuris.org/2013/02/27/judge-kozinskis-rich-history-of-piracy/>> accessed 6 July 2018. See also Robin Churchill, ‘The Piracy Provisions of the UN Convention on the Law of the Sea—Fit for Purpose?’ in Panos Koutrakos and Achilles Skordas (eds), *The Law and Practice of Piracy at Sea: European and International Perspectives* (Bloomsbury 2014) 16–18. Churchill argues that acts of terrorism that might be hard to distinguish from other acts of piracy ought not to be excluded, but that environmental protest, clearly aimed at a specific target, ought to be.

⁴⁹ Guilfoyle (n 46) 42.

⁵⁰ *Institute of Cetacean Research and Others v Sea Shepherd Conservation Society and Watson* (US, 9th Circuit, Court of Appeal) 725 F3d 940 (2013) 5–6. In that case the acts of violence included: ‘Ramming ships, fouling propellers

Chief Judge Kozinski stated that: ‘We conclude that “private ends” include those pursued on personal, moral or philosophical grounds, such as Sea Shepherd’s professed environmental goals. That the perpetrators believe themselves to be serving the public good does not render their ends public.’⁵¹ Similarly, the Belgian Court of Cassation held that the subjective motives of Greenpeace protestors taking violent action against another vessel as part of a protest about polluting activities were irrelevant to the characterisation of the acts as piracy.⁵² Therefore, although a detailed analysis of the question of ‘private ends’ is beyond the scope of this thesis, these authorities, together with persuasive commentary, suggest that acts of protest may well be capable of amounting to piracy, and thus subject to the associated right on the part of other States to enforce their jurisdiction.

Taken as a whole, the law of the sea contains broad powers for States to exercise jurisdiction with respect to protest. As is generally the case under the law of the sea, these powers are greatest at the State’s own coast and attenuate towards the high seas. While the provisions in question do not deal explicitly with protest, they are broad enough in their drafting for States to argue a wide range of activities related to protest to be covered.

8.4. Protest at sea under IHRL

Before considering the relevant rights under IHRL, and their application to MSOs, it is important first to briefly acknowledge the pervasive issue of the spatial scope of applicability of the instruments in question. Protests may occur throughout the maritime domain, as illustrated by the three cases outlined above. *Women on Waves* concerned action taken by the Portuguese authorities to prevent protest within Portugal’s territorial sea and internal waters. *Drieman* concerned protests against Norwegian fishing vessels; on the facts of the case, the protest occurred within Norway’s EEZ, but was of a kind that could take place anywhere where fishing occurs, including on the high seas. Meanwhile,

and hurling fiery and acid-filled projectiles easily qualify as violent activities, even if they could somehow be directed only at inanimate objects.’ *ibid* 6.

⁵¹ *ibid* 5.

⁵² *Castle John and Nederlandse Stichting Sirius v NV Mabeco and NV Parfin* (Belgium, Court of Cassation) (1986) 77 ILR 537.

Arctic Sunrise concerned a protest at least partly within a declared safety zone, in waters forming part of Russia's EEZ.

Chapters Two and Three examined the territorial and extraterritorial applicability, respectively, of the treaties under consideration. The conclusions reached therein are as applicable in the context of protest as in any other. In summary, outside of a State's territorial sea, and internal and archipelagic waters, throughout which the treaties apply as part of a State's territory, applicability depends on the existence of a jurisdictional link between the State and the individual in question. With respect to protest, actions taken by a State to limit rights connected with protest, such as the arrest of individuals, or the use of force, are likely to amount to the exercise of authority and control such as to engage the rights in question. Within the maritime domain, as explained in Chapter Three, the argument for applicability on this basis is likely to be more persuasive than the alternative suggestion that a State's obligations are engaged through its effective control of an area outside of its territory.⁵³

8.4.1. Relevant rights

The rights most relevant to protest at sea are the freedoms of expression and of assembly.⁵⁴ Indeed, as illustrated by the cases outlined above, where a State takes action against a protest, this can often be framed both as a violation of the freedom of the protestors to assemble, as well their freedom to express their views. With respect to the freedom of expression, Article 19(2) ICCPR states that, 'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.' Article 10(1) ECHR states that,

⁵³ See above s 3.3.4. Notably, however, the amicus brief submitted by Greenpeace in *Arctic Sunrise* argued for the applicability of the ICCPR on the basis of Russia's effective control over the safety zone surrounding the oil platform. Greenpeace *amicus* brief (n 23) para 47. This was, however, only one of the arguments made.

⁵⁴ On the freedom of expression, generally, see Kevin Boyle and Sangeeta Shah, 'Thought, Expression, Association, and Assembly' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, OUP 2014) 225–31; Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (OUP 2009) 467–74. On the freedom of assembly, generally, see Boyle and Shah (n 54) 234–235; Kälin and Künzli (n 54) 474–80.

‘Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.’ Article 13(1) of the American Convention on Human Rights (ACHR) states that, ‘Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.’⁵⁵ Finally, Article 9 of the African Charter on Human and Peoples’ Rights (ACHPR) states simply that:

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.⁵⁶

Turning to freedom of assembly, under Article 21 ICCPR, ‘The right of peaceful assembly shall be recognized.’ Similarly, under Article 11(1) ECHR, ‘Everyone has the right to freedom of peaceful assembly’, and, under Article 15 ACHR, ‘The right of peaceful assembly, without arms, is recognized.’ Finally, under Article 11 ACHPR, ‘Every individual shall have the right to assemble freely with others.’ As discussed below, however, the protection of both freedoms is subject to lawful limitation according to certain criteria defined in the treaties themselves, and as developed through subsequent jurisprudence.

8.4.2. Activity engaging freedoms of expression and of assembly

There is a considerable overlap between the freedoms of expression and of assembly, particularly where individuals gather to express ideas and opinions, as is often the case with respect to acts of protest. As a result, the policing of a particular incident will often be alleged to breach of both the freedom of assembly and the freedom of expression, and it may be difficult to separate the two. This is reflected in the practice of courts and treaty bodies. For example, in

⁵⁵ American Convention on Human Rights: ‘Pact of San José, Costa Rica’ (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 144 (ACHR) art 13(1).

⁵⁶ African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (ACHPR) art 9.

Women on Waves, the ECtHR decided to approach the matter from the perspective of Article 10 alone, while reserving to itself the right to consider Article 11 in its interpretation of the alleged violation of Article 10.⁵⁷ In *Drieman*, the Court dealt with the alleged violations of Articles 10 and 11 together.⁵⁸

Moreover, the two rights have each been interpreted broadly. With respect to freedom of expression, it is clear from the texts of the relevant provisions that it entails the rights both to impart and to receive information, that is, for it to be heard by its intended audience. It also encompasses, in the view of the Human Rights Committee (HRC), ‘every form of idea and opinion capable of transmission to others’,⁵⁹ and is capable of application to acts of protest taking many forms, limited not just to the written or spoken word, but also to more abstract modes of expression.⁶⁰ Hence, the ECtHR has, for example, concluded that blowing horns to disrupt fox hunting,⁶¹ physically impeding a grouse shoot,⁶² and occupying trees to prevent their felling as part of road construction⁶³ are all protected forms of expression. Practice under the ACHPR is less developed, although, as noted below, the freedom of assembly has been interpreted by the African Commission so as to recognise the right to participate in similar activities. Notably, however, practice in connection with Article 13 ACHR ‘has not yet reached diverse forms of expression’, and has focused instead on ‘information and speech concerning typical public affairs’.⁶⁴ Given, as noted below, the particularly onerous criteria for limitations to the freedom of expression under Article 13 ACHR it is perhaps likely that it will not be applied so broadly as its counterparts under the other instruments.

Considering freedom of assembly, the term ‘assembly’ has been interpreted widely, including gatherings of more than one person that take place in either

⁵⁷ *Women on Waves* (n 2) [28].

⁵⁸ *Drieman* (n 12).

⁵⁹ UN Human Rights Committee, ‘General Comment No 34’ (12 September 2011) UN Doc CCPR/C/GC/34 (HRC General Comment 34) para 11. See also William A Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 455.

⁶⁰ HRC General Comment 34 (n 59) para 12.

⁶¹ *Hashman and Harrup v the United Kingdom* ECHR 1999-VIII 1 [28].

⁶² *Steel and Others v the United Kingdom* ECHR 1998-VII [92].

⁶³ *ibid* [92].

⁶⁴ Thomas M Antkowiak and Alejandra Gonza, *The American Convention on Human Rights: Essential Rights* (OUP 2017) 237

public or private; those that are static or mobile; and those that are restricted in their participation or open to all.⁶⁵ The term is qualified in the ICCPR, ECHR and ACHR by the requirement that the assembly be 'peaceful'; and, although Article 10 ACHPR does not contain the same caveat, the African Commission has stated that 'The right to freedom of assembly extends to peaceful assembly.' However, although the requirement that assembly, and hence protest, be peaceful certainly excludes the protection of individuals who are violent, as well as, according to the ECtHR, those who have violent intentions, this limitation should not be read too strictly. The fact that a protest involves isolated acts of violence, because of the participation in it of extremist elements, does not necessarily extinguish the right of assembly of peaceful participants.⁶⁶ As the African Commission notes, 'An assembly should be deemed peaceful if its organizers have expressed peaceful intentions, and if the conduct of the assembly participants is generally peaceful.'⁶⁷ Furthermore, acts of civil disobedience, in themselves, do not extinguish the right, so long as they are not violent.⁶⁸ Consistent with the practice of the ECtHR noted above with respect to freedom of expression, the African Commission has stated that 'peaceful' assembly includes 'conduct that annoys or gives offence as well as conduct that temporarily hinders, impedes or obstructs the activities of third parties.'⁶⁹

It is clear that a wide range of activities are capable of engaging one or both of the freedoms of expression and assembly in the context of maritime protest. This is not limited to the mere dissemination of information; conduct, including that which may impact on the rights of others, may also be protected. Hence, in *Women on Waves*, the ECtHR had little difficulty in finding Article 10 to have

⁶⁵ Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (3rd edn, OUP 2013) paras 19.03–19.04; Schabas (n 59) 494–95.

⁶⁶ See, for example, *Schwabe and MG v Germany* ECHR 2011-VI (extracts) [103] ; African Commission on Human and Peoples' Rights, 'Guidelines on Freedom of Association and Assembly' (adopted during the 60th Ordinary Session in Niamey, Niger, 8–22 May 2017) (Guidelines on Freedom of Association and Assembly in Africa) para 70(b) ('Isolated acts of violence do not render an assembly as a whole non-peaceful.'). See also Joseph and Castan (n 65) para 19.05; Schabas (n 59) 495.

⁶⁷ Guidelines on Freedom of Association and Assembly in Africa (n 66) para 70.

⁶⁸ Joseph and Castan (n 65) para 19.05; Schabas (n 59) 495.

⁶⁹ Guidelines on Freedom of Association and Assembly in Africa (n 66) para 70(a).

been engaged, noting that it protects both ideas and their mode of expression. It considered that the rights of the applicants extended not just to communicating their views on reproductive rights, but also to the means by which they wished to do so, including the symbolic act of sailing their ship into Portuguese waters. Denying the entry of the *Borndiep* into the Portuguese territorial sea prevented the applicants from using the mode of expression they considered most effective (noting that the Court's reasoning implies that the *actual* effectiveness of the chosen mode is immaterial).⁷⁰

In *Driemann*, the ECtHR accepted that the *Greenpeace* campaign was intended as a protest against whaling, and that 'restrictions on conduct' could amount to an infringement of the freedom of expression, although declined to determine whether the particular activities in question were protected under Articles 10 or 11, instead, proceeding on the assumption that they were.⁷¹ Nevertheless, it is submitted that the actions of the type used by protestors in *Driemann* and *Arctic Sunrise*, which have the effect of disrupting fishing or other, apparently lawful, activities, are analogous to those which have been found by the ECtHR to engage the freedom of expression in cases involving, for example, the disruption of hunts on land. Arguably they ought, therefore, to be similarly eligible for protection.

In sum, there is no sensible reason why the broad scope of the freedoms of expression and assembly, as applied on land, should not apply equally in the maritime domain. Differences between the treaties under consideration may arise with respect to the freedom or freedoms considered to be engaged by a particular activity; however, it is nevertheless likely that one or both freedoms will be engaged by a wide range of activities involved in protest at sea. These are not limited just to those activities intended to impart information, but also include acts that interfere with navigation or other lawful uses of the oceans, including fishing and the exploitation of other resources. Of course, the fact that a particular activity is protected under one or both freedoms does not mean that it cannot be lawfully curtailed. Instead, it means that the focus will be on the lawfulness of measures taken to limit those freedoms, rather than whether the freedoms are engaged at all.

⁷⁰ *Women on Waves* (n 2) [30].

⁷¹ *Drieman* (n 12).

8.4.3. Lawful interference with maritime protest

The freedoms of expression and assembly are not absolute and may be subject to lawful limitation, which must conform to certain criteria. As set out below, these are largely framed, or have subsequently been interpreted, in similar terms. The notable exception to this is Article 13 ACHR, which, so far as it is relevant, states:

2. The exercise of the right [to freedom of thought and expression] shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure
 - a. respect for the rights or reputations of others; or
 - b. the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

Article 13(4) goes on to allow ‘prior censorship’ for certain public entertainments, while Article 13(5) states that ‘propaganda for war’, along with certain categories of hate speech, ‘shall be considered as offenses punishable by law.’ These narrow exceptions aside, and although Antkowiak and Gonza note that the Inter-American Court of Human Rights (IACtHR) has relaxed its approach, leading to an increased discretion and ‘lack of rigor’ in applying Article 13,⁷² limitations to the freedom of expression are available in a narrower set of circumstances than is the case under the other provisions set out below. In the context of protest, action taken to halt a protest, or prevent it from taking place, is likely to amount to either prior censorship or an indirect limitation. Therefore, unless the protest concerns one of the narrow categories covered in Article 13(5), such actions are likely to be prohibited. Were a case similar to *Women on Waves* to be dealt with under the ACHR, the actions of the authorities would arguably be in clear breach of Article 13, without the requirement for any assessment, as discussed below, as to their proportionality.

⁷² Antkowiak and Gonza (n 64) 243–44.

Notably, as explained above, the forms of expression that have been recognised to date under the ACHR are narrower than those recognised under, for example, the ECHR. In particular, they have not included acts of a nature to disrupt the activities of third parties. Although it is conceivable that practice under the ACHR will develop in this regard, the narrow scope of limitations under Article 13 provides a persuasive policy reason why this might not happen, given that there is no mechanism on the face of Article 13 by which the rights of a third party could be balanced, except through the imposition of subsequent liability. This, arguably, would be the case with respect to the type of maritime protest, such as that in *Drieman*, which chiefly comprises an attempt to halt an activity of which the protestors disapprove. For the same reason, if practice under the ACHR does develop, it is conceivable that a mechanism matching that found in the other instruments, as explained below, would be read into Article 13.

Turning to limitations to the freedom of expression under the other instruments, Article 19(3) ICCPR states that:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Similarly, Article 10(2) ECHR states that:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

In contrast to the detail of the ECHR and ICCPR, Article 9(2) ACHPR simply caveats the right to freedom of expression by the requirement that it must be 'within the law', but is also subject to the common duty under Article 27(2),

which states that: 'The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.' Although this is formulated in different terms to the ECHR and ICCPR, the African Commission, as Olaniyan notes, attempted to harmonise the provisions,⁷³ including the statement in its *Declaration of Principles on Freedom of Expression in Africa* that, 'Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary in a democratic society.'⁷⁴

Turning to freedom of assembly, Article 21 ICCPR contains the following:

No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Similarly, Article 11(2) ECHR states:

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

With respect to the ACHR, Article 15 contains the following:

No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedom of others.

Finally, under Article 11 ACHPR, 'The exercise of [the right to freedom of assembly] shall be subject only to necessary restrictions provided for by law, in

⁷³ Kolawole Olaniyan, 'Civil and Political Rights in the African Charter on Human and Peoples' Rights: Articles 8–14' in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights* (2nd edn, CUP 2008) 221–25.

⁷⁴ *African Commission on Human and Peoples' Rights, 'Declaration of Principles on Freedom of Expression in Africa' (adopted during the 32nd Ordinary Session in Banjul, Gambia, 17–23 October 2002) para 11(2).*

particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.'

Putting aside limitations to the freedom of expression under the ACHR, discussed above, it is clear from the text of the relevant provisions (and the subsequent interpretation of Article 9 ACHPR by the African Commission) that limitations to either the freedom of expression or the freedom of assembly under each instrument must meet three common criteria: legality, necessity and legitimate purpose.

8.4.3.1. *Legality*

Considering, first, the requirement of legality, any limitation must be provided (for) by law (Article 19 ICCPR, Article 11 ACHPR and Article 9 ACHPR as subsequently interpreted by the African Commission), prescribed by law (Articles 10 and 11 ECHR), or imposed in conformity with the law (Article 21 ICCPR and Article 15 ACHR). While the law in question may be written or unwritten, it must be accessible and formulated with sufficient precision such that individuals can predict its application to their conduct and act accordingly.⁷⁵ Beyond these general criteria, Schabas identifies the requirement that, under the ECHR, the limitation must be found in *domestic* law,⁷⁶ a conclusion broadly consistent with the ECtHR's jurisprudence.⁷⁷ This was the situation in *Drieman*, in which the actions of the Norwegian authorities were founded in an Act of the Norwegian parliament, as extended by a Royal Decree, as well as in the Norwegian Penal Code.⁷⁸ At least so far as its decision on admissibility was concerned, the Court saw 'no reason to question that the measures had a legal basis in national law...as interpreted on its own or in the light of international law.'⁷⁹

The requirement of legality was, however, subject to analysis in both Chapters Four and Five,⁸⁰ the conclusions of which are also valid here. In summary, there is a reasonable argument that the legal basis for the limitation to a right may be

⁷⁵ HRC General Comment 34 (n 59) para 25; Schabas (n 59) 469–70.

⁷⁶ Schabas (n 59) 469.

⁷⁷ See, for example, *Leyla Şahin v Turkey* ECHR 2005-XI 173 [84].

⁷⁸ *Drieman* (n 12).

⁷⁹ *ibid.*

⁸⁰ See above ss 4.4.2.2, 5.4.4.

derived from international law, potentially including even that which is not formally incorporated according to the particular State's own constitutional arrangements, so long as it is sufficiently foreseeable and precise in its application. In the context of the policing of protest at sea, an obvious potential source of legal authority comes from the law of the sea, and UNCLOS in particular.

Notably, in *Women on Waves*, it was agreed by the parties, and accepted by the Court, that the limitation on Article 10 ECHR had been prescribed by law,⁸¹ specifically Articles 19(2) and 25 UNCLOS.⁸² Although in this case there was domestic law that did apply, namely a decree of the Portuguese government, coupled with the legislation containing maritime enforcement powers, it is significant that it was the provisions of UNCLOS on which the parties, and Court, appear to have relied. The provisions in question permit a coastal State to 'take the necessary steps in its territorial sea to prevent passage which is not innocent',⁸³ which includes 'embarkation or disembarkation of goods, funds or persons in violation of customs, fiscal, sanitary or immigration laws and regulations of the coastal State' and 'any other activity not directly related to the crossing'.⁸⁴

In light of the discussion in Chapters Four and Five, the key question is whether the law in question is sufficiently precise and foreseeable in its application. In this case, it is difficult to reconcile the broad terms in which the cited provisions of UNCLOS are framed, indeed referring to coastal State laws and regulations, with that standard. In light of the agreement by the parties on the point, it may be that the ECtHR in *Women on Waves* gave little attention to the legality of the measures taken, choosing instead to focus on their disputed necessity. If, however, the court had considered the question of legality more closely, it might have been less willing to recognise the sufficiency of the UNCLOS provisions and might instead have paid closer attention to the position under Portuguese law.

⁸¹ *Women on Waves* (n 2) [32].

⁸² UNCLOS (n 1) arts 19(2), 25.

⁸³ *ibid* art 25(1).

⁸⁴ *ibid* arts 19(2)(g), 19(2)(l). These are the particular provisions referred to by the ECtHR in *Women on Waves*. *Women on Waves* (n 2) [16].

8.4.3.2. *Legitimate aim*

Taking the other requirements out of order, under each of the instruments (again excepting Article 13 ACHR), limitations to freedom of expression must be for a legitimate aim, which are usually enumerated exhaustively.⁸⁵ With respect to freedom of expression, under Article 19(3) ICCPR, these are: respect of the rights or reputations of others; protection of national security; protection of public order; and protection of public health or morals. Under Article 10(2) ECHR, the aims recognised as legitimate are: national security; territorial integrity; public safety; the prevention of disorder or crime; the protection of health or morals; the protection of the reputation or rights of others; preventing the disclosure of information received in confidence; and maintaining the authority and impartiality of the judiciary. In contrast, Article 9 ACHPR, as interpreted in the *Declaration of Principles on Freedom of Expression in Africa*, requires simply that ‘any restrictions...serve a legitimate interest’; however, noting the efforts of the African Commission to achieve harmony in interpretation,⁸⁶ it is likely that limitations under Article 9 will be subject to the same requirements as for the corresponding provisions under the other instruments.

Legitimate purposes for limiting the freedom of assembly are framed in similar, though not identical, terms. Article 21 ICCPR adds ‘public safety’ to the legitimate aims listed under Article 19(3) ICCPR, presumably contemplating dangers attached to large gatherings of people, and replaces the protection of the ‘reputation of others’ with the ‘freedoms of others’, again tailored to reflect the particular impact of the freedom in question. Article 11(2) ECHR replaces protection of the ‘reputation’ of others with protection of their ‘freedoms’; omits references to the disclosure of confidential material and protection of the judiciary; and adds a clause excluding measures that apply to the armed forces and other agents of the State. Article 15, which has no equivalent in connection with freedom of expression, lists national security; public safety; public order; protection of public health or morals; and protection of the rights or freedom of others, as legitimate grounds for restrictions. Finally, the legitimate purposes for

⁸⁵ HRC General Comment 34 (n 59) para 22.

⁸⁶ Olaniyan (n 73) 221.

limitation to Article 11 ACHPR are national security; safety; health; ethics; and the rights and freedoms of others.

These legitimate aims are exhaustive; however, despite some minor differences, the instruments share a number of grounds, such as national security, protection of public order or safety, and the protection of the rights of others, that are framed broadly enough that States are likely to be able to frame almost any conceivable measure taken to police protest in compatible terms. Indeed, as Schabas notes, the practice of the ECtHR is often to place little or no emphasis on identifying the legitimate aim of a particular limitation to the freedoms of expression or assembly, focusing instead on the necessity of the measures.⁸⁷

The difficulty of arguing that a limitation is not for a legitimate purpose is borne out by both *Women on Waves* and *Drieman*. In the former, the applicants argued that the claimed legitimate grounds—protection of public order or health—did not arise because they never intended to violate Portuguese health laws. However, the Court agreed with the government, albeit without further explanation, that its aims were legitimate because they were *directed* towards those ends.⁸⁸ This is undoubtedly correct; the legitimacy of a limitation's aims are a question solely related to the limitation itself, while the necessity of applying the limitation in any given situation is a separate question, to which the ECtHR typically focuses the bulk of its analysis.

In *Drieman*, the applicants claimed that Norway's actions were not in pursuit of a legitimate aim, because Norway's resumption of commercial whaling was contrary to international law.⁸⁹ However, the Court was satisfied that Norway had pursued a legitimate aim, namely the prevention of disorder and the protection of the rights of others. The question of the compatibility of the relevant domestic law with Norway's other commitments in international law, and the legitimacy of the aim in that sense, was a matter for Norway's own national Courts.⁹⁰

⁸⁷ Schabas (n 59) 471, 512.

⁸⁸ *Women on Waves* (n 2) [34]–[35].

⁸⁹ *Drieman* (n 12).

⁹⁰ *ibid.*

In sum, the requirement for a legitimate purpose is unlikely to present a significant hurdle in the regulation of protest at sea. In almost any conceivable situation of protest, the State concerned is likely to be able to argue that its purpose in interfering falls in one of the broadly framed categories, particularly the prevention of disorder or the protection of the rights of others. The latter purpose will be particularly relevant where the actions of protests interrupt lawful activity, including fishing and other similar activity, such as whaling, as was the case in *Driemann*. It is important to recognise that there may be a legitimate purpose even in the case of a grossly disproportionate infringement of the rights in question. When a protest is expected to result in any level of disruption whatsoever, the State will have a legitimate purpose in preventing disorder and protecting the rights of others. Indeed, even where a State may have some other motive, such as the suppression of particular political views, which does not amount to a legitimate purpose, it is likely to be able to identify a plausible, legitimate, alternative behind which to conceal its real motives.

8.4.3.3. *Necessity*

Turning, finally, to the requirement of necessity, Article 19(3) ICCPR requires that limitations to freedom of expression must be ‘necessary’. Limitations to the equivalent rights under the other instruments must be ‘necessary in a democratic society’. This means that the legitimate aim being pursued cannot be achieved by means that do not impair the right in question.⁹¹ Furthermore, the requirement of necessity has been interpreted as requiring conformity with the principle of proportionality.⁹² In the language of the HRC this means that limitations ‘must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; [and] they must be proportionate to the interest to be protected’.⁹³ Furthermore, the ECtHR has interpreted the ECHR’s reference to necessity specifically ‘in a democratic society’ as permitting only those

⁹¹ See, for example, HRC General Comment 34 (n 59) para 33; Schabas (n 59) 469–70.

⁹² See, for a reiteration of extensive ECtHR practice on this point, *Pentikäinen v Finland* App no 11882/10 (ECtHR, 20 October 2015) [87].

⁹³ HRC General Comment 34 (n 59) para 34 (quoting UN Human Rights Committee, ‘General Comment No 27’ (2 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9 para 14). See also Schabas (n 59) 474–75.

limitations that address a 'pressing social need'.⁹⁴ Of relevance to protest, this is likely to represent a high barrier to restrictions to political speech.

Illustrating the application of these concepts, in *Women on Waves*, the Court noted the requirement for limitations both to address a 'pressing social need' and to be proportionate,⁹⁵ though its analysis did not clearly separate the two criteria. It re-emphasised that the mode of expression, as well as the content, was protected by Article 10, particularly in the case of symbolic activities intended to challenge perceived injustice, such as the use of the ship in the present case.⁹⁶ This was not affected by an earlier ECtHR decision, in which no violation was found where the prohibited means of expression would have required granting the applicants a right to enter private property, thereby interfering with the rights of the property owner.⁹⁷ While, in that case, the availability of alternative means was relevant in reconciling the rights of the protestors with those of the property owners, in *Women on Waves* there were no competing rights against which to balance the applicants' desired mode of expression. Of note, in the course of its reasoning, the Court emphasised that the territorial sea is '*un espace public et ouvert de par sa nature même*',⁹⁸ which could not, therefore, be equated with private property.

Considering, more squarely, the question of proportionality, the Court found that there had been no intention on the part of the applicants to violate domestic law; if prohibited drugs were on board, there was no indication that they were actually to be administered. In any case, means less prejudicial to freedom of expression, such as seizure of the drugs, could have been used to address that particular concern.⁹⁹ There were other ways for the State to achieve its legitimate aims, without banning the entry of the *Borndiep* and deploying a warship to enforce the decree. The Court noted that such a radical measure was also likely to deter others from challenging the established order, in which the freedom of expression was at its most valuable. As a result the actions of

⁹⁴ See, for example, *Pentikäinen v Finland* (n 92) [87]. See also Schabas (n 59) 474.

⁹⁵ *Women on Waves* (n 2) [36].

⁹⁶ *ibid* [39].

⁹⁷ *Appleby and Others v the United Kingdom* ECHR 2003-VI 185.

⁹⁸ 'A public space, open by its very nature'. *Women on Waves* (n 2) [40].

⁹⁹ *ibid* [41].

the Portuguese authorities were disproportionate and there had been a violation of Article 10.¹⁰⁰

The decision in *Drieman* provides an informative counterpoint. Considering the question of necessity in a democratic society, the Court noted that the applicants had been permitted to mount their protest, and had done so for a month without restraint. The Norwegian government had intervened only with respect to the two specific incidents, in which the actions of the *Solo* had interfered directly with lawful whaling, to the extent that abandoning the hunt was left as the 'only real option for the whalers.'¹⁰¹ Such interference 'could not enjoy the same privileged protection under the Convention as political speech or debate on questions of public interests or the peaceful demonstration of opinions', and thus must be subject to a wide margin of appreciation on the part of States in their restriction of such conduct.¹⁰² The applicants' behaviour was not merely an incident of navigation; indeed, 'the Court attache[d] weight to the fact that the purpose of the measures was...to ensure the efficient implementation of the legal protection of lawful exploitation of the living resources in the respondent State's exclusive economic zone.'¹⁰³ The Court considered that Norway's actions fell within its margin of appreciation; they were proportionate and could reasonably be considered as necessary in a democratic society. Consequently, the application was declared inadmissible on account of its being manifestly ill-founded.¹⁰⁴

The cases, taken together, suggest that limitations to the freedoms of expression and assembly will be subject to a high barrier, particularly where a protest does not directly impact on the rights of others. However, where protest does interfere with the rights of others, such as where it prevents the lawful exploitation of marine resources, States will enjoy a much wider margin of appreciation in deciding whether and how to take action against protestors. However, States will have to gauge carefully the point at which to intervene, and potentially exercise restraint, as the Norwegian authorities did in *Drieman*

¹⁰⁰ *ibid* [42]–[44].

¹⁰¹ *Drieman* (n 12).

¹⁰² *ibid*.

¹⁰³ *ibid*.

¹⁰⁴ *ibid*.

by allowing the protest to continue up until the point that the protestors' actions would have forced the whalers to halt their lawful activity.

8.5. Conclusion

This chapter has departed from those that preceded it by focusing on rights that primarily affect the lawfulness of a MSO as a whole, rather than the manner in which it is conducted or specific actions undertaken in the course of its execution. Important issues of applicability aside, and notwithstanding some differences between the instruments under consideration, a wide range of activities related to protest at sea are likely to engage the rights to freedom of expression and assembly. State action that curtailed these rights is permitted, but only where it meets the requirements of legality, necessity and legitimate aim.

The two cases of *Women on Waves* and *Driemann* illustrate how these principles are likely to be applied in practice. In light of how broadly the two freedoms are construed, a wide range of conduct is likely to engage one or both rights, and the more pertinent issue will relate to the lawfulness of interference with those rights. In turn, the focus in determining that question is likely to be on the necessity, including proportionality, of the measures taken. As *Women on Waves* demonstrates, where a protest is peaceful and does not directly impact on the rights of others, including safety of navigation, the bar for demonstrating that interference is necessary or proportionate is likely to be set very high. Although *Driemann* demonstrates that interference with protest at sea certainly may be permitted in some circumstances, on the facts of that case, it was only where the actions of the protestors interfered directly with the lawful use of the oceans to the extent that such use was no longer possible. Indeed, the fact that less intrusive protest had already been tolerated for some time was relied upon, in that case, as evidence of the necessity of interfering.

In any case, however, these cases, and the wider analysis, demonstrate how IHRL can act as a significant restraint on what States are otherwise permitted to do under the law of the sea. As reflected in the provisions of UNCLOS set out above, the law of the sea contains provisions ostensibly authorising States to take action against those protesting at sea in a variety of circumstances. However, those authorisations do not, in themselves, justify limitations to the

freedoms of expression and assembly, even if they might possibly be relied upon to meet the legality requirement under IHRL.

9. Conclusion

This thesis argues that international human rights law (IHRL), as represented by the selection of universal and regional treaties that have been considered, provides an important normative framework within which maritime security operations (MSOs) are to be conducted. To do so, it has presented research intended to address a number of specific questions, which were set out in Chapter One. This final chapter draws together the results of that research in order to provide answers to those questions, thereby explaining and justifying the proposition set out above.

9.1 What are the activities undertaken in the course of MSOs that are most likely to engage IHRL obligations?

A broad range of activities that comprise MSOs have been presented in the course of the thesis that may engage IHRL obligations. The survey has not been exhaustive, but rather was intended to examine those on which the impact of IHRL may be most significant. These include some activities that have already been the result of litigation under IHRL treaties, specifically in the context of MSOs. In particular, deprivation of liberty, discussed in Chapter Five, and *non-refoulement*, discussed in Chapter Seven, have both been the subject of cases under the European Convention on Human Rights (ECHR). Similarly, the European Court of Human Rights (ECtHR) has also heard cases where the freedoms of expression and assembly have been engaged in the context of protest at sea, discussed in Chapter Eight.

Notably, however, the thesis has also examined activities to which the application of IHRL in the context of MSOs is less well-established, but arguably justified. Perhaps most importantly, the use of force, discussed in Chapter Four, is a key feature of many MSOs, particularly those that involve interdiction, where force is an important means of coercion. In addition, in Chapter Six, the thesis examined the response to situations where vessels are in distress. Both of these areas of activity are analogous to their land-based equivalents, to which the application of IHRL is well-established. As a result, they are obvious candidates for its application in the context of MSOs.

9.2. How are those activities regulated by other bodies of international law, especially the law of the sea?

Other bodies of law, notably the law of the sea, do, undoubtedly, play a role in regulating the activities that have been examined. With respect to the use of force, although the United Nations Convention on the Law of the Sea (UNCLOS) does not provide regulation, obligations on the part of States using force in the course of MSOs have been read into the law of the sea by a number of tribunals. The same, or similar, regulation has been written into a number of agreements dealing with particular situations in which the interdiction of vessels is authorised. However, these obligations are usually limited to the use of force itself, authorising only that which is reasonable and necessary, and requiring a process of escalation in the means employed.

Considering the provision of assistance to those in distress at sea, the law of the sea contains a number of obligations on the part of States, both to require masters of ships flying their flags to assist vessels in distress, as well as to make provision for search and rescue facilities. *Non-refoulement*, on the other hand, does not feature in the law of the sea, but does represent the cornerstone of refugee law, albeit restricted, under that body of law, exclusively to refugees. The other activities considered, detention and the policing of protest, are largely unregulated by any other body of international law, though both may be the subject of regulation under domestic law. Although the law of the sea may provide authorisation, in some circumstances, for such activities, it provides little or no detail as to how those activities are to be carried out.

9.3. In what circumstances can IHRL apply to those activities, if at all?

The applicability of IHRL to MSOs, both within and beyond a State's territory, is of fundamental importance to the central argument of this thesis. It is only if IHRL applies consistently to a broad range of activities comprising MSOs, wherever they are conducted, that it can sensibly be considered as an important normative framework for their execution. Moreover, the extraterritorial applicability of IHRL, in particular, is both controversial and an area in which the treaties under consideration potentially differ.

Chapter Two considered the territorial applicability of the treaties under consideration, which, at least in a land-based context, is not normally in dispute. However, in spite of a common assumption that this translates inevitably to the maritime domain, the unique features of a State's maritime territory arguably necessitate closer scrutiny of the issue. When that analysis is done, it can be persuasively argued that the IHRL instruments under question do, in fact, apply with a State's territorial sea, as well as its internal and archipelagic waters (if any), although potentially modified by conflicting rules of the law of the sea.

The more vexed question of the extraterritorial applicability of the instruments under consideration was the subject of Chapter Three. Notwithstanding differences in the law and practice between the instrument between them, each treaty is capable of extraterritorial application in some circumstances. For the main treaties—the ECHR, as well as the International Covenant on Civil and Political Rights (ICCPR), American Convention on Human Rights (ACHR) and African Charter on Human and Peoples' Rights (ACHPR)—this depends on the existence of a jurisdiction link with the individual concerned. Notably in the case of MSOs, that jurisdictional link can be established in a number of circumstances, including, at least for some instruments, flag-State jurisdiction over ships, as well as some limited situations in which a State exercises effective control over an area of the sea outside its territory. More importantly, however, it can be established where a State, through its agents, exercises authority or control over individuals.

Drawing on practice relating directly to MSOs, as well as on principles derived from analogous situations on land, it was argued that this latter form of jurisdiction will arise consistently in connection with the execution of MSOs. Although this proposition is, in some circumstances, controversial, a convincing argument can be made for the applicability of the treaties under consideration on this basis to the use of force against interdicted vessels. Less controversially, the jurisdictional link can be established through control of an interdicted vessel, such as by directing its course or speed, or directly over those on board through detention. Although there are limits to extraterritorial applicability on the basis of authority and control over individuals, particularly in connection with the obligation to rescue vessels in distress discussed in

Chapter Six, it arguably provides the necessary support for the underlying premise on which this thesis is based.

9.4. What are the relevant IHRL rules and norms, and how do they apply to the specific activities that comprise MSOs?

A broad range of rights are engaged by the activities that have been examined in the course of the thesis. These include not only those that relate directly to the effects of actions undertaken in the course MSOs, including the right to life, and the right to liberty and security of the person, but also those that may be engaged by the MSO as a whole, such as the freedoms of expression and assembly. The thesis has not attempted to consider, in detail, all of the potential rights engaged in the course of MSOs, but has instead examined the application of those for which their application in a maritime context raises specific issues.

Without rehearsing the detail of the application of every right that has been considered, what is particularly notable is the range of obligations that can flow from a particular right. Taking the right to life, for example, it not only acts to limit the use of force to only that which is lawful, necessary and proportionate, but extends to obligations relating to the training of those using force, the development and procurement of equipment, the planning and control of operations, and ensuring accountability for violations. It can also apply, in a different context, to require the establishment of search and rescue services. Similarly, while the right to liberty prohibits unlawful or arbitrary detention, it also carries specific procedural obligations even in the case of lawful and non-arbitrary deprivation of liberty. Although these obligations have been applied in a way that recognises the specific challenges State face in the course of MSOs, they do, nevertheless, apply.

Another notable theme is that IHRL does not generally prohibit activities involved in MSOs, or MSOs themselves outright, except in the case of certain rights, such as the prohibition of torture. Instead, IHRL generally imposes requirements, with which States must comply if a particular activity is not to violate the right in question. These requirements vary between rights, but some common principles can clearly be identified. Most consistently, a measure that limits the enjoyment of a particular right must generally have a basis in law, and

must usually amount to a necessary and proportionate means to achieve a legitimate objective. In some cases, such as in the policing of protest, the margin of appreciation given to States is relatively wide, notwithstanding that their actions must nevertheless comply with these requirements.

9.5. How does the regulation of MSOs by IHRL compare to its regulation by other bodies of law, and what are the links between the different legal regimes?

The predominant conclusion, comparing the regulation of MSOs by IHRL, to its regulation under other bodies of international law, is that IHRL contains a much more comprehensive framework of obligations. Although, as specific examples have demonstrated, MSOs may be regulated under *domestic* law, this is entirely dependent on the State in question. Activities that are largely untouched by other bodies of international law, such as deprivation of liberty, or the policing of protest, are subject to detailed and specific requirements under IHRL. Furthermore, other areas that *are* regulated by other bodies of law are subject to either more comprehensive, or more detailed, regulation by IHRL. With respect to the former, the principle of *non-refoulement*, although prominent in refugee law, manifests itself in a far wider range of circumstances under IHRL. Turning to the latter, the regulation of the use of force under IHRL entails a much larger set of obligations than arise under the law of the sea.

Notwithstanding the general conclusion that regulation of MSOs is more comprehensive than under other bodies of international law, there are some narrow areas where other bodies of law go further than IHRL in certain respects. Notably, the obligation to assist those in distress, although argued to arise in some circumstances under IHRL, is limited by the applicability of the IHRL instruments in question. Under the law of the sea, on the other hand, the obligation is more clearly defined and, in some respects, more extensively applicable than under IHRL. However, this is a notable exception with respect to the activities and the rights that have been examined.

Irrespective of the specific rule concerned, a key difference between IHRL and other bodies of international law is the availability of individual complaint procedures. While enforcement mechanisms may exist with respect to other bodies of international law, including the law of the sea, these do not generally

allow for individuals complaints. Although dependent on the State concerned being party to the relevant treaty or protocol, each of the IHRL treaties under consideration is subject to the jurisdiction of a court or treaty body before which individuals can claim alleged violations against States parties.

Turning to the links with other bodies of law, three main points can be made. First, as alluded to above, IHRL provides the regulatory regime for activities that find their authorisation in other bodies of law including, most notably in the context of MSOs, the law of the sea. UNCLOS, for example, authorises States to exercise jurisdiction over foreign ships in limited circumstances on the high seas, or which are in violation of a coastal State's lawful regulations in maritime zones to which its sovereignty extends, or in which it enjoys sovereign rights. However, it says little or nothing about how that jurisdiction is to be enforced, an area where it has been shown that IHRL provides comprehensive regulation.

Second, the compatibility of a particular measure with relevant rules of IHRL may depend on it having a basis in law, which, least controversially, may be found in the domestic law of the State concerned. However, as has been discussed in several contexts though the thesis, that basis arguably may also be found in international law, so long as the relevant provision is sufficiently precise and foreseeable in its application. As a result, rules of the law of the sea may, for example, provide the legal basis for the limitation of rights under IHRL.

Finally, IHRL may be complementary to other bodies of law. This is the case for the assistance of those in distress at sea, with respect to which both IHRL and the law of the sea contain similar obligations, albeit with differing content scope of application, and very different options for raising alleged violations. Similarly, protection from *refoulement* under IHRL can be considered complementary to its overlapping, but narrower, protection under refugee law.

9.6. Final remarks

As noted above, the applicability of the instruments under consideration to a wide variety of MSOs, conducted both within and beyond a State's territory, is central to the central proposition of this thesis, and was therefore addressed first. Although the topic remains controversial in many respects, and some of the analysis is unavoidably tentative as a result, the conclusions reached

provide the necessary foundation for the subsequent discussion of substantive IHRL rules and norms. That discussion covered a broad spectrum of the activities that comprise MSOs and the issues they raise. Within each area, IHRL contains obligations over and above those found in other bodies of international law. Even where activities are regulated elsewhere, the depth and breadth of regulation under IHRL is almost always greater. Moreover, although differences arise between IHRL treaties, and practice under some is more developed than under other, including in connection with MSOs, there is a significant degree of commonality between the regional treaties and with the ICCPR. It is submitted that, in light of these conclusions, obligations under IHRL amount to an important framework of regulation within which MSOs must be conducted.

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